

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

LYNN MCGLOTHEN, *Applicant*

vs.

**KELLEHER LUMBAR CORPORATION;
INSURANCE COMPANY OF THE WEST, *Defendants***

**Adjudication Number: ADJ13463458
Oakland District Office**

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

Defendant seeks removal of the Order Denying Emergency Petition to Stay PQME¹ Evaluation (Order) issued by the workers' compensation administrative law judge (WCJ) on December 8, 2020.² By the Order, the WCJ denied defendant's Emergency Petition to Stay PQME Evaluation on December 19, 2020 Under CCR 10470.

Defendant contends that the Order will result in significant prejudice and irreparable harm because the evaluation with the QME will proceed before the dispute regarding the QME panel specialty has been addressed.

We did not receive an answer from applicant. The WCJ issued a Report & Recommendation on Petition for Removal (Report) recommending that we deny defendant's Petition.

We have considered the allegations of defendant's Petition for Removal and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant removal, rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion.

¹ PQME stands for panel qualified medical evaluator.

² The Order is dated December 7, 2020, but was served on December 8, 2020.

FACTUAL BACKGROUND

Applicant claims injury to the back through May 21, 2020 while employed as a stocker by Kelleher Lumbar Corporation.

On December 4, 2020, defendant filed a declaration of readiness to proceed (DOR) to a mandatory settlement conference. The issue was identified as “PANEL SPECIALTY” and summarized as follows:

APPLICANT PULLED A CHIROPRACTIC PANEL ON DELAYED CLAIM UNDER LC 4060 DESPITE THE FACT THAT IT WAS NOT DENIED. MOREOVER, THEY DID NOT PULL AN APPROPRIATE PANEL AS THE APPLICANT ALLEGES HE IS SURGICAL.

(Defendant’s DOR, December 4, 2020, p. 2.)

A hearing date of February 8, 2021 was requested, which was scheduled.

On December 7, 2020, defendant filed an Emergency Petition to Stay PQME Evaluation on December 19, 2020 Under CCR 10470 (Petition). In its Petition, defendant stated that a PQME evaluation was scheduled with Jonice Owen, D.C. for December 19, 2020. Dr. Owen was apparently selected from a chiropractic QME panel obtained by applicant. Defendant objected to proceeding with the evaluation because it contends that the correct panel specialty is orthopedic due to applicant’s reported need for surgery.

The WCJ issued the Order denying defendant’s Petition on December 8, 2020. The Order stated in pertinent part:

Defendant has not demonstrated good cause for such an emergency stay. The exhibits to defendant’s petition reflect that defendant received the list of panel evaluators on October 19, 2020 (Exhibit B) and that on November 13, 2020, it received the appointment notice for the December 19, 2020 evaluation (Exhibit A). Defendant does not explain why it did not act at that time. Further, defendant did not advise whether applicant’s claim had been accepted and the Appeals Board has issued persuasive panel opinions holding that that a party may request a QME panel per sections 4060 and 4062.2(b). (See e.g. *Chavarria v. Crews of California, Inc.* (December 2, 2019, ADJ12402022) [2019 Cal. Wrk. Comp. P.D. LEXIS 534].)

(Order, December 8, 2020, p. 1.)

The Order also quoted extensively from *Ramirez v. Jaguar Farm Labor Contracting, Inc.* (2018) 84 Cal.Comp.Cases 56 [2018 Cal. Wrk. Comp. P.D. LEXIS 442] regarding the appropriateness of chiropractic as a panel specialty.

The matter remains scheduled for a hearing on February 8, 2021 per defendant's DOR.

DISCUSSION

WCAB Rule 10530(a) (formerly Rule 10470) permits a party to file with the presiding WCJ an emergency petition to stay an action by another party pending a hearing. (Cal. Code Regs., tit. 8, former § 10470(a), now § 10530(a) (eff. Jan. 1, 2020).) The Rule provides in relevant part:

Upon the receipt of a proper petition to stay an action, the presiding workers' compensation judge shall, in their discretion, either: (1) Deny the petition; (2) Grant a temporary stay and set the petition for a hearing; or (3) Set the petition for a hearing, without either denying the petition or granting a temporary stay.

(Cal. Code Regs., tit. 8, former § 10470(e), now § 10530(d) (eff. Jan. 1, 2020).)

Preliminarily, it is unclear why defendant's Petition was not presented to the presiding WCJ of the district office as provided by WCAB Rule 10530(a). Another WCJ may be designated to perform the functions of the presiding WCJ. (Cal. Code Regs., tit. 8, § 10305(p) (eff. Jan. 1, 2020).) However, the record does not reflect if the presiding WCJ of the district office designated the WCJ to address this Petition and it is therefore uncertain if the WCJ had the authority to issue the disputed Order.

Assuming arguendo that the WCJ was designated to address the Petition, WCAB Rule 10530(d) permits the presiding WCJ to deny an emergency petition to stay at their discretion. Yet, the Order denying defendant's Petition here also addressed the merits of the issues raised in the Petition including discussing attached records that have not been admitted into evidence. (See *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be based on admitted evidence in the record].) While we can appreciate the WCJ's desire to provide the parties with guidance on this issue, we will rescind the Order to ensure the parties have an opportunity to present evidence and their respective arguments regarding the QME panel specialty prior to a determination of the dispute. (See *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70

Cal.Comp.Cases 312] [due process requires notice and a meaningful opportunity to present evidence in regards to the issues].) The dispute may be addressed in further proceedings including at the upcoming hearing that remains scheduled for February 8, 2021.

Therefore, we will grant removal, rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal of the Order Denying Emergency Petition to Stay PQME Evaluation issued by the WCJ on December 8, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Order Denying Emergency Petition to Stay PQME Evaluation issued by the WCJ on December 8, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 5, 2021

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

**ALBERT AND MACKENZIE
LYNN MCGLOTHEN
WELTIN STREB & WELTIN**

AI/pc

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