

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

ANNALISA PALMORE, *Applicant*

vs.

**STATE OF CALIFORNIA, Legally Uninsured c/o
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ16034585
Salinas District Office**

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

Applicant seeks removal of the June 8, 2022, Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that defendant substantially complied with California Code of Regulations, title 8, section 31.5(a)(12) and ordered that Dr. Scheinbaum be replaced as the panel qualified medical evaluator. The WCJ also found that the November 16, 2021, report of Dr. Scheinbaum is inadmissible.

The WCJ prepared a Report and Recommendation on Petition for Removal recommending that the petition be denied. For the reasons discussed below, we will grant removal and amend the Findings and Order to find that the November 16, 2021, report is admissible and to correct the order regarding the specialty for the replacement panel. We will affirm the remainder of the Findings and Order.

As an initial matter, if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases

1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will address the petition as a Petition for Removal and apply the removal standard to our review. (See *Gaona, supra.*)

We affirm the WCJ's Order to select a replacement panel qualified medical evaluator. Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra.*) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) In this case, applicant has not shown that she is entitled to removal of the decision to replace the panel qualified medical evaluator.

However, we will grant removal to amend the Findings and Order to find that the November 16, 2021, report of Dr. Scheinbaum is admissible. Statutory and case law favor the admissibility of medical reports provided they were obtained in accordance with the Labor Code. (See Lab. Code, §§ 4064(d), 5703(a), 5708; e.g., *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209].) The Labor Code does not require us to exclude late reports from evidence.

The WCJ also cited section 4628(e) in finding the report inadmissible. (Lab. Code, § 4628(e).) Section 4628 is an anti-ghostwriting statute and a physician's failure to comply with the statute renders a report inadmissible. (See *Scheffield Medical Group v. Workers' Comp. Appeals Bd.* (1999) 70 Cal.App.4th 868, 881.) However, Dr. Scheinbaum's report reflects that he performed the review of records, testing and evaluation of applicant himself. (Joint Exhibit J1, PQME Report Joel Scheinbaum, M.D., March 25, 2022, p. 1.) Thus, there is not a basis to exclude his report from evidence under section 4628. The finding will be amended to state that the report is admissible and the order stating his report is not admissible as evidence will be removed (Order No. 3).

For the foregoing reasons,

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

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the June 8, 2022, Findings and Order is **AFFIRMED**, **EXCEPT** Finding of Fact No. 6 and then Orders are amended as follows:

FINDINGS OF FACT

6. Dr. Scheinbaum's report is admissible as evidence.

ORDERS

1. It is ordered that Dr. Scheinbaum is no longer the panel qualified medical evaluator in this case.
2. It is ordered that the Medical Unit issue a replacement panel in the specialty of psychiatry (MPD).

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 19, 2023

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

**ANNALISA PALMORE,
SPRENKLE, GEORGARIOU & DILLES, LLP
STATE COMPENSATION INSURANCE FUND, LEGAL**

MWH/mc

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