

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

PAULA GARCIA, *Applicant*

vs.

**RAMCO ENTERPRISES, Permissibly Self-Insured;
INTERCARE HOLDINGS INSURANCE SERVICES, INC., *Defendants***

**Adjudication Number: ADJ14954569
Salinas District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in this matter to further study the factual and legal issues presented. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration in response to the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on April 5, 2022. As relevant herein, the WCJ found that the Medical Unit erroneously required a statement from the parties that no panel Qualified Medical Evaluation (QME) took place prior to issuing a replacement QME panel under *Romero v. Costco Wholesale* (2007) 72 Cal.Comp.Cases 824, and that good cause existed for panel numbers 2742845, 2533637 and 2793435 to be replaced with a new panel in the specialty of chiropractic.

Defendant contends that the Medical Unit did not err in rejecting both parties' original requests for a replacement panel, and that defendant was entitled to request a replacement panel after the Medical Unit determined it was unable to fulfill applicant's request for a new panel for technical reasons.

Applicant filed an Answer contending that since it was the first party to submit the request for a replacement QME panel, it had the right to designate the QME specialty. Applicant also contends the Medical Unit was erroneous in rejecting applicant's request for a replacement panel. We received a Report and Recommendation (Report) from the WCJ on the Petition from Reconsideration recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and based upon the WCJ's analysis of the merits of the petitioner's arguments in the WCJ's report, as our decision after reconsideration, we will affirm the F&O with the exception of Finding of Fact 3, which we will amend to reflect that the Medical Unit was entitled to request further information as to whether an examination of the applicant had taken place with an evaluator from the original PQME panel.

FACTUAL BACKGROUND

Applicant claims injury on May 18, 2019 to various body parts while employed by the defendant.

The Medical Unit issued a QME panel (panel number 2533637) in the specialty of orthopedic surgery on February 27, 2020 (Joint Exhibit J-7, Unrepresented Orthopedic QME Panel No. 2533637, March 9, 2020, p. 1); applicant was not represented by an attorney when that panel was issued. (Joint Exhibit J-1, Applicant's request for replacement QME panel, August 6, 2021, pp. 1-3.)

Applicant became represented by counsel on July 24, 2021. Counsel for applicant submitted a request for a replacement panel from the Medical Unit pursuant to *Romero* on August 6, 2021. (Joint Exhibit J-1.)

Defendant also requested a replacement panel pursuant to *Romero* on August 11, 2021. (Joint Exhibit J-2, Defendant's request for replacement QME panel, August 11, 2021, p. 1.)

The Medical Unit issued a letter dated August 19, 2021 to applicant's counsel that stated, in relevant part:

The Medical Unit is unable to fulfill your panel request for the reason(s) listed below.

We are in receipt of your "Romero" Replacement Panel request dated 8/6/2021 for Panel 2533637 (MOS) issued on 3/9/2021.

It is unclear whether the injured employee was ever evaluated by a QME from the panel. If the injured employee was already seen by a QME from the panel, the same evaluator would need to be used for follow up for supplemental reports. (See L.C. 4062.3(k) and C.C.R. § 31.7(a).)

If the injured employee was not evaluated by a QME from the panel then either party may request for a new panel under the *Romero* decision (72 Cal. Comp. Cases 824).

When resubmitting your completed Replacement Panel Form 31.5 and Declaration of Service, under comments, indicated the reason is “ROMERO”, injured employee is not represented, the prior panel was not utilized and the specialty you’re requesting with the three letter code.

(Joint Exhibit J-3, DWC rejection letter to Applicant’s counsel, August 19, 2021, p. 1.)

In response to defendant’s August 11, 2021 request, the Medical Unit issued a second panel (No. 2742845) in the specialty of orthopedic surgery on September 9, 2021. (Joint Exhibit J-5, Orthopedic Panel No. 2742845, September 9, 2021, p. 1.)

Defendant requested a replacement panel from the Medical Unit on August 30, 2021, stating the reason for the request was “[a]pplicant failed to appear for evaluation with Dr. Fisher. She has never been evaluated by another QME. Defendant requests replacement panel in ortho[pedic] specialty under Romero.” (Joint Exhibit J-4, Defendant’s second request for a replacement panel, August 30, 2021, p. 1.)

Applicant’s counsel submitted a letter to the Medical Unit dated September 2, 2021 that stated, in relevant part, that it had not received a response to its August 6, 2021 request for a replacement panel, and that the applicant had never been evaluated by Dr. Chaplan. (Joint Exhibit J-9, Applicant’s second request, September 2, 2021, p. 2.)

The Medical Unit issued a letter dated September 16, 2021 to applicant’s counsel stating, in relevant part:

We are in receipt of your “Romero” Replacement Panel request dated 8/6/2021 for Panel 2533637 (MOS) issued on 3/9/2020, requesting (DCH). ADJ14954569

Please be advised Defendant’s Romero request has already been issued.

Panel 2742845 (MOS) issued on 9/1/2021. A copy of the panel is attached for your review, use and records.

Please resolve all objections regarding the validity of panels issued by the Medical Unit by filing an appeal with the appropriate District Office of the Workers’ Compensation Appeals Board (WCAB) under Labor Code § 31.1.

The medical unit [will] take no further action at this time.

(Joint Exhibit J-6, DWC rejection letter to Applicant’s counsel, September 16, 2021, p. 1.)

The Medical Unit issued a third panel to defendant's second replacement request in the specialty of orthopedic surgery on January 11, 2022. (Joint Exhibit J-8, Orthopedic Panel No. 2793435, January 11, 2022, p. 1.)

The parties proceeded to Expedited Hearing on February 17, 2022. According to the Minutes of Hearing (MOH), the stipulations, as relevant herein, were that applicant sustained injury arising out of and occurring in the course of her employment (AOE/COE) with body parts deferred. The issues were:

- (a) Whether the Medical Unit was entitled to obtain the information it sought in this case as a condition to issuing a *Romero* panel.
- (b) When the Medical Unit rejected the parties' initial *Romero* requests, should the Medical Unit have provided the parties with a new QME panel, based on receiving defendant's *Romero* request first in time? And, if not, is Panel No. 2793435 invalid, and should the Medical Unit be ordered to issue a new panel based on applicant's *Romero* request?

(MOH, February 17, 2022, p. 2.)

On April 5, 2022, the WCJ issued his F&O and found in relevant part that the Medical Unit erroneously required a statement from the parties that no panel QME took place prior to issuing a replacement QME panel under *Romero*, and that good cause existed for panel numbers 2742845, 2533637 and 2793435 to be replaced with a new panel in the specialty of chiropractic.

In his Report, the WCJ stated:

Thus, I found that while the Medical Unit was entitled to request the additional information, it could not invalidate Applicant's first-in-time panel request, by making its receipt of additional information a condition for issuing the panel, when both parties stated they were relying on the *Romero* decision.

(Report, May 5, 2022, pp. 3-4.)

In its petition, defendant contends the WCJ erred in ordering the Medical Unit to replace the three orthopedic surgery QME panels with the panel in chiropractic requested by applicant pursuant to *Romero*. Applicant, in its answer, contends it has the right to select the panel QME specialty as it was the first to request a *Romero* replacement panel; the fact that the initial request was rejected on technical grounds does not terminate the applicant's pending request thereby allowing defendant the opportunity to request a panel in defendant's desired specialty.

The WCJ issued a Report and Recommendation on the Petition for Reconsideration reiterating his findings from the April 5, 2022 F&O.

DISCUSSION

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.)¹ 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 challenging an interlocutory finding in the decision which is the issue of whether applicant was entitled to the replacement panel. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

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.,

¹ All further statutory references are to the Labor Code unless otherwise stated.

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).)

Defendant contends that because the Medical Unit requested additional information from applicant in response to its initial request for a replacement panel, applicant lost its place in line and defendant was therefore entitled to request a replacement panel in its desired specialty². The Medical Unit may delay issuing a QME panel pending receipt of requested additional information. (Cal. Code Regs., tit. 8, § 30(a)(4).) This request should have merely delayed a determination by the Medical Unit rather than allowing defendant to step in with a request that was ultimately treated as though it was first-in-time. Furthermore, applicant had never been evaluated by a QME, so applicant did not lose her place in line. Here, based upon the WCJ's analysis of the merits of the petitioner's arguments, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Next we will turn to the issue of the WCJ's Finding of Fact number three. As the WCJ articulates in the Report, the Medical Unit did indeed have the authority to request additional information from applicant before making a determination pursuant to Rule 30(a)(4). However, this finding was not the basis for the WCJ's decision that replacement panels were appropriate. Thus, we will amend Finding of Fact 3 to reflect that the Medical Unit was entitled to request further information as to whether an examination of the applicant had taken place with an evaluator from the original PQME panel.

Accordingly, as our Decision After Reconsideration, we affirm the F&O except that we amend Finding of Fact 3 as stated above.

² Employee's panel request upon becoming represented is for a "new" panel, which means the employee may designate the panel specialty as the requesting party. There is no requirement that the new panel be in the same specialty as the original panel. (See *City of Tracy v. WCAB (Luckhardt)* (2019) 84 Cal.Comp.Cases 838 (writ den.).)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of April 5, 2022 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. Based on the circumstances herein, the Medical Unit was entitled to request additional information as to whether an examination of the applicant had taken place with an evaluator from the original PQME panel.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 17, 2022

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

**PAULA GARCIA
SPRENKLE, GEORGARIOU & DILLES, LLP
BAVA & ASSOCIATES, PC**

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