

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

**ESMERALDA BORREGO, *Applicant***

**vs.**

**MONTEREY COUNTY OFFICE OF EDUCATION, permissibly self-insured;  
administered by INTERCARE HOLDINGS INSURANCE SERVICES, *Defendants***

**Adjudication Number: ADJ15429242  
Salinas District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
REMOVAL**

Defendant seeks removal of the Findings and Orders (F&O) of April 19, 2022, wherein the workers' compensation administrative law judge (WCJ) found in relevant part that the PQME panel in the case was a valid panel and ordered that Dr. Curran was the PQME. Defendant contends that applicant should not have been treated as unrepresented as she had been "coached" by an attorney and also that its petition for sanctions should have been granted.

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

We have considered the allegations of the Petition for Removal and the contents of the Report with respect thereto. Based on our review of the record, and based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will deny removal.

**FACTS**

Applicant, while employed on September 8, 2021, by Monterey County Office of Education, sustained injury arising out of and in the course of employment to her hands, forearms, and elbows. Applicant also claimed to have sustained injury arising out of and in the course of employment to her right shoulder. (3/22/22 Minutes of Hearing/Statement of Evidence (MOH/SOE), Stipulation 1.) Applicant testified that she sought a Qualified Medical Evaluator (QME) because defendant denied injury to her right shoulder. (MOH/SOE, p. 5.) She checked the wrong box on the request form because she thought the issue was whether the injury was work

related instead of a dispute about body parts. (MOH/SOE, p. 5; Ex. A1, PQME Panel Request, dated 9/29/21, p. 1.) She received notice from defendant on November 15, 2021, that it had cancelled her appointment with PQME Dr. Curran; she attended the appointment on December 1 because she felt she needed to keep the appointment as it was already set and because she wanted a proper evaluation. (MOH/SOE, p. 6.) She met with an attorney prior to the December 1 appointment with Dr. Curran. (MOH/SOE, p. 6.) Applicant did not sign a fee agreement with an attorney until December 28, 2021. (Ex. A7, Fee Disclosure Statement, dated 12/28/21, p. 1.)

### DISCUSSION

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 substantial 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).) Here, based upon the WCJ's analysis of the merits of petitioner's arguments, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

The PQME process is used to settle a dispute over the compensability of any injury. (Lab. Code, § 4060(a).)<sup>1</sup> However, a different procedure is used to select the PQME for applicants who are represented by an attorney and applicants who are not represented by an attorney. (Lab. Code, §§ 4060, 4062.1, 4062.2.)

Once the parties have identified a medical dispute, the procedure for obtaining a panel of QMEs where applicant is not represented is governed by section 4062.1, which provides in pertinent part:

(b) If either party requests a medical evaluation pursuant to Section 4060, 4061, or 4062, either party may submit the form prescribed by the administrative director requesting the medical director to assign a panel of three qualified medical evaluators in accordance with Section 139.2. However, the employer may not submit the form unless the employee has not submitted the form within 10 days after the employer has furnished the form

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

to the employee and requested the employee to submit the form. The party submitting the request form shall designate the specialty of the physicians that will be assigned to the panel.

(c) Within 10 days of the issuance of a panel of qualified medical evaluators, **the employee shall select a physician from the panel** to prepare a medical evaluation, the employee shall schedule the appointment, and the employee shall inform the employer of the selection and the appointment. If the employee does not inform the employer of the selection within 10 days of the assignment of a panel of qualified medical evaluators, then the employer may select the physician from the panel to prepare a medical evaluation. If the employee informs the employer of the selection within 10 days of the assignment of the panel but has not made the appointment, or if the employer selects the physician pursuant to this subdivision, then the employer shall arrange the appointment. Upon receipt of written notice of the appointment arrangements from the employee, or upon giving the employee notice of an appointment arranged by the employer, the employer shall furnish payment of estimated travel expense.

(Lab Code § 4062.1(b), (c) [emphasis added].) In contrast, when an applicant is represented, “Within 10 days of assignment of the panel by the administrative director, each party may strike one name from the panel. The remaining qualified medical evaluator shall serve as the medical evaluator.” (Lab Code § 4062.2(c).)

The crux of defendant’s argument is that the applicant should have been required to use the represented track pursuant to section 4062.2, which allows the defendant to strike one name from the panel, instead of the unrepresented track in section 4062.1, which allows the applicant to select the PQME. We find no merit to defendant’s argument.

A person who consults with an attorney for the purpose of securing legal advice is only a prospective client and is not considered to be represented by an attorney until a fee agreement is signed. (Cal. Rules of Prof’l Conduct, Rule 1.18; see, e.g., *Gomez v. Salinas Valley Mem. Hosp.* (Nov. 1, 2019, ADJ12201816) [2019 Cal. Wrk. Comp. P.D. LEXIS 468, \*5]; *Schuler v. City of Menlo Park* (April 11, 2011, ADJ7111589, ADJ7318183) [2011 Cal. Wrk. Comp. P.D. LEXIS 245, \*3-4]; *Pantoja v. SGN Constr.* (May 12, 2010, ADJ2956778, ADJ2989292) [2010 Cal. Wrk. Comp. P.D. LEXIS 142, \*18-20].)<sup>2</sup> However, the discussions and advice between an attorney and

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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

a prospective client are protected by the attorney-client privilege even before the client becomes represented by the attorney. (*Gomez v. Salinas Valley Mem. Hosp.*, *supra*, 2019 Cal. Wrk. Comp. P.D. LEXIS at p. \*6.)

Therefore, as applicant consulted with an attorney prior to the selection of a PQME but had not signed a fee agreement with an attorney, the non-represented track pursuant to section 4062.1 was appropriate. Further, applicant's discussion with an attorney prior to signing a fee agreement is protected by attorney-client privilege. However, the content of any conversations prior to the signing of the agreement is irrelevant as applicant was still entitled to the unrepresented track pursuant to section 4062.1.

Defendant also claims that applicant made an incorrect choice on the Request for PQME by checking the box "to determine if the injury is work related" instead of the box stating that the work claim injury was accepted for one or more body parts but "there is a dispute over additional body parts" as the reason for the request. Applicant stated she checked the wrong box on the request form because she thought the issue was whether the injury was work related instead of a dispute about body parts. (MOH/SOE, p. 5; Ex. A1, PQME Panel Request, dated 9/29/21, p. 1.) However, a PQME was necessary under either category and therefore no substantial prejudice or irreparable harm will result if removal is not granted.

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banc).) We find the reasoning in these cases persuasive given that the case currently before us involves similar legal issues.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Removal of the Findings and Orders of April 19, 2022, is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ JOSÉ H. RAZO, COMMISSIONER

**I CONCUR,**

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



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

**January 11, 2024**

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

**ESMERALDA BORREGO  
SPRENKLE, GEORGARIOU & DILLES, LLP  
D'ANDRE 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. *abs*