

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

FERNANDO TAPIZ, *Applicant*

vs.

**CITY OF WATSONVILLE, permissibly self-insured,
adjusted by LWP CLAIMS SOLUTIONS, INC., *Defendants***

**Adjudication Numbers: ADJ9916631, ADJ9916635, ADJ10221548
Salinas District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in these cases. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks removal of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 4, 2021. By the F&O, the WCJ found that applicant has not shown good cause for issuance of additional qualified medical evaluator (QME) panels in psychology and internal medicine.

Applicant contends that he will be irreparably harmed by the F&O because he is prevented from conducting necessary medical-legal discovery until additional panels are issued in these specialties.

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

We have considered the allegations of applicant'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 rescind the F&O and issue a new decision finding that there is good cause for additional QME panels in psychology and internal medicine.

¹ Deputy Commissioner Newman, who was previously on the panel, has retired and is unavailable to participate further in this matter. Another panel member was assigned in his place.

FACTUAL BACKGROUND

Applicant claims three injuries while employed as a firefighter captain by the City of Watsonville: to the neck, upper extremities and right hip on October 30, 2012 (ADJ9916631); to the low back, right hip and lower extremities on March 31, 2012 (ADJ9916635); and to the left hip, low back, neck, bilateral carpal tunnel syndrome, psyche and sleep through December 10, 2014 (ADJ10221548).² Defendant denies compensability for the psyche and sleep. (Minutes of Hearing, October 8, 2020, p. 2.)

The parties had previously used an orthopedic agreed medical evaluator (AME), Dr. Mark Anderson, to evaluate his claims. On June 5, 2019, the WCJ issued a Findings Award and Orders wherein she found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to the left hip and low back in ADJ9916635 and to the neck in ADJ9916631. The WCJ also appointed Dr. Michael Post as a regular physician to address permanent disability and apportionment per Labor Code³ section 5701 because Dr. Anderson's opinions were not considered substantial evidence. (Lab. Code, § 5701.) Neither party challenged this decision.

In his August 22, 2019 report, Dr. Post stated in pertinent part:

Please note that any issues pertaining to internal medicine are outside the scope of my expertise and practice and should be addressed by a forensic internal medicine evaluator if pursued on an industrial basis. Any issues pertaining to his psyche are outside the scope of my expertise and practice and should be addressed by a forensic psychiatric evaluator if pursued on an industrial basis.

(Joint Exhibit J-21, Report of Michael Post, M.D., August 22, 2019, p. 2.)

Dr. Post deferred issues related to alleged injury in the form of depression, sleep or heart trouble to evaluators in psychology and internal medicine in his 2020 deposition. (Joint Exhibit J-19, Deposition of Michael Post, M.D., March 12, 2020, pp. 7-10.)

In June 2020, applicant filed a Petition for Additional QME Panels with the Specialty Preferences of Psychology (PSY) and Internal Medicine (MMM). Defendant filed an objection to applicant's Petition. The matter proceeded to trial on October 8, 2020 on the sole issue of

² Applicant had two other claims against defendant, ADJ9917276 and ADJ9917279, which were dismissed. (Minutes of Hearing, December 11, 2018, p. 2.)

³ All further statutory references are to the Labor Code unless otherwise stated.

applicant's Petition for additional QME panels in these specialties. (Minutes of Hearing, October 8, 2020, p. 2.)

The WCJ issued the F&O as outlined above.

DISCUSSION

I.

Applicant sought removal of the F&O. 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 AOE/COE, 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 of injury AOE/COE to several body parts. Injury AOE/COE is threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

II.

Although the decision contains a finding that is final, applicant is only challenging an interlocutory finding/order in the F&O regarding whether there is good cause for additional QME panels in psychology and internal medicine. Therefore, we will apply the removal standard to our

review. (See *Gaona, supra.*)

Removal is discretionary and is generally employed only as an extraordinary remedy which must be denied absent a showing of significant prejudice or irreparable harm, or that reconsideration will not be an adequate remedy after issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); *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].)

Administrative Director (AD) Rule 31.7(b) provides for an additional QME panel in another specialty as follows 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:

...

(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(a) and (b)(3); see also Cal. Code Regs., tit. 8, § 32.6.)

When a new medical dispute arises, the parties should obtain a follow-up or supplemental evaluation from the same evaluator to the extent possible. (See e.g., *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board 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., as relevant to this matter, if the WCJ orders an additional panel.

Applicant has pled injury to his psyche and sleep. Defendant disputes compensability for these parts. The appointed physician Dr. Post has stated that addressing issues in psychology or internal medicine are outside his expertise. Section 4062.2 governs the process to obtain a

medical-legal evaluation from a panel QME in a represented case if the parties do not agree on an AME. (Lab. Code, § 4062.2.) In the absence of additional panels in psychology and internal medicine, applicant is prevented from conducting necessary medical-legal discovery to meet his burden of proof to show compensability for these additional parts. We therefore agree with applicant that additional QME panels in psychology and internal medicine are necessary to evaluate his claim. (See also *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906 [the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues].)

In the January 5, 2017 Opinion and Decision After Reconsideration, a split panel issued a decision finding that applicant sustained injury AOE/COE to the cervical spine, lumbar spine, left hip and bilateral carpal tunnel syndrome in ADJ10221548. In the June 5, 2019 Findings Award and Order, there was a finding of injury AOE/COE to the left hip and low back in ADJ9916635, and a finding of injury AOE/COE to the neck, but not to the upper extremities in ADJ9916631. It is unclear from the parties' stipulations at the October 8, 2020 trial whether changes were made to the findings of injury. Since the sole issue at trial was whether applicant is entitled to additional QME panels, we do not address any issues with respect to the findings of injury and will leave it to the parties to reconcile any discrepancies. Accordingly, we substitute a new F&O which only addresses the issue of additional QME panels.

Therefore, we will rescind the F&O and issue a new decision finding that there is good cause for additional QME panels in psychology and internal medicine. We will also order panels in these specialties be issued.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration by the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on January 4, 2021 is **RESCINDED** in its entirety and the following is **SUBSTITUTED** in its place:

FINDING OF FACT

1. There is good cause for additional QME panels in psychology and internal medicine.

ORDER

IT IS HEREBY ORDERED applicant's request for additional QME panels in psychology (PSY) and internal medicine (MMM) is granted.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 7, 2021

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

**FERNANDO TAPIZ
LAW FIRM OF MAYEN & HERRERA
MACINTYRE & WHITE**

AI/pc

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