

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

GREGORIO PADILLA, *Applicant*

vs.

USA WASTE OF CALIFORNIA, INC.; ACE AMERICAN INSURANCE, *Defendants*

**Adjudication Number: ADJ11181283
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will affirm the Findings and Order issued by the WCJ on June 14, 2021.²

¹ Commissioner Dodd was unavailable to participate further in this decision and was replaced by another panelist.

² The Findings and Order is dated June 11, 2021, but was not served until June 14, 2021.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on June 14, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ AMBER INGELS, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2021

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

**GREGORIO PADILLA
LAW OFFICES OF RONALD P. EHRMAN
LAW OFFICES OF SLADE & NEIGHBORS**

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*

REPORT AND RECOMMENDATION
ON PETITION FOR REMOVAL

I.

INTRODUCTION

Petitioner, USA Waste of California, Inc., insured by ACE American Insurance, administered by Gallagher Bassett Services, has filed a timely & verified Petition for Removal, contending this Court should not have Ordered additional QME panels in the fields of Internal Medicine, Psychology, and ENT.

II.

FACTUAL BACKGROUND

Gregorio Padilla, born November 20, 1951, while employed on July 31, 2017, as a driver, at Long Beach, California, by USA Waste of California, Inc., insured by Ace American Insurance, sustained injury arising out of and in the course of employment to his right shoulder, right elbow, right knee, and claims to have sustained injury arising out of and in the course of employment to his right hand, eye, neck, hearing, excretory, dizziness, gastrointestinal, constipation, sleep disorder, high blood pressure, exposure, and tactile feel.

The Applicant filed his initial “Application for Adjudication of Claim” on January 30, 2018 (**EAMS DOC ID 25335703**), claiming injury to his shoulders, upper extremities, knee, and other body systems. An amended “Application for Adjudication of Claim” was subsequently filed on July 16, 2018 (**EAMS DOC ID 26797437**), adding cervical spine. A second amended “Application for Adjudication of Claim” was filed on October 28, 2019 (**EAMS DOC ID 71454429**), this time alleging a cumulative injury which began on September 1, 1978 and ended on April 15, 2018, resulting in injury to his upper extremities, other body systems, dizziness, GI, sleep disorder, right hand, eyes, hearing, exposure, and tactile feel.

On February 27, 2020, Applicant filed a “Declaration of Readiness,” declaring he was ready to proceed to hearing on issues related to a request to strike PQME Guellich’s report(s) and a request for additional PQMEs in “different” specialties. (**EAMS DOC ID 31755796**).

On July 13, 2020, a Mandatory Settlement Conference was held, and after several additional hearings and continuances, the matter was set for trial before the undersigned Judge.

Trial was held on April 28, 2021, with the parties submitting the issues to the Court. After a review of the evidence and testimony, the Court found the

Applicant did not meet his burden in regard to obtaining a replacement of Panel QME Dr .Guellich based on bias, but found Applicant did meet his burden in regard to obtaining additional Panel QMEs in the specialties of Internal Medicine (MMM), Psychology (PSY), and ENT (MTO) are necessary.

It is from these Findings & Order that Defendant petitions for Removal pursuant to Labor Code Section 5310.

III.

DISCUSSION

Defendant's Assertion the Order will result in significant prejudice and irreparable harm to defendant and Reconsideration will not be an adequate remedy after the issuance of a final order

A Petition for Reconsideration is the appropriate mechanism to challenge a final order, decision, or award. Labor Code Section 5900. An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a final order. See *Maranian v. Workers' Compensation Appeals Board* (2000) 81 Cal. App. 4th 1068 [65 Cal. Comp. Cases 650; *Safeway Stores, Inc. v. Workers' Compensation Appeals Board* (Pointer) (1980) 104 Cal. App. 3d 528 [45 Cal. Comp Cases 410].

Accordingly, Defendant's Petition may be considered as a Petition for Reconsideration since this Court made findings concerning the substantive rights of the parties including the finding that the Applicant was employed by the Defendant and sustained admitted industrial injuries to specific parts of body alleged. While defendant is not appealing those specific findings that affect the substantive rights of the parties, it is objecting to an interlocutory order for additional panel QME physicians. Therefore, Defendant's Petition is a hybrid of a Petition for Reconsideration and Petition for Removal.

Removal by the Appeals Board is an extraordinary remedy rarely exercised. *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5, 71 Cal.Comp.Caes 155, 157, fn. 5; *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2, 70 Cal.Comp. Cases 133, 136, fn. 2. Removal will only be granted if the Petitioner shows the order at issue will result in significant prejudice or irreparable harm if not granted and that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award. *California Code of Regulations §10843(a); Cortez, supra; Kleeman, supra.*

In the Petition for Removal, Defendant asserts the Order will result in significant prejudice and irreparable harm to Defendant. As the basis for this assertion, Defendant relies on the costs associated with additional PQMEs.

After reviewing Defendant's Petition for Removal, in conjunction with the evidence/testimony, it does not appear the costs associated with the additional PQMEs will result in prejudice and irreparable harm to the Defendant in the instant case.

Defendant's Assertion the Findings and Order allowing additional panels is a violation of the law

According to 8 CCR 31.7, Obtaining Additional QME Panel in a Different Specialty, 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; or

In the instant case, QME Dr. Frank Guellich issued several medical-legal reports that were subsequently admitted into evidence. In his May 21, 2019 report (**Joint Exhibit W - Dr. Guellich, Orthopedic PQME Re-Eval Dated 05-21-19**), Dr. Guellich summarized various medical records he had reviewed prior to finalizing his report. According to Dr. Guellich, Applicant's medical history consists of issues related to sinus rhythm, premature ventricular complexes, possible left atrial enlargement, borderline ECG, constipation, abdominal distention, decreased hearing in both ears, tinnitus, numbness/weakness in right side of face, mild atherosclerotic changes, keratitis in right eye, sigmoid diverticulosis, dyspepsia, dizziness, hypertension, high blood pressure, and others. ((**Joint Exhibit W - Dr. Guellich, Orthopedic PQME Re-Eval Dated 05-21-19**), pgs 3-23).

On October 28, 2019, applicant filed an amended Application for Adjudication of Claim, alleging a cumulative injury which began on September 1, 1978 and

ended on April 15, 2018, resulting in injury to his upper extremities, other body systems, dizziness, GI, sleep disorder, right hand, eyes, hearing, exposure, and tactile feel.

The following month, on November 1, 2019, QME Dr. Guellich was deposed by Applicant's Attorney. During this deposition, Dr. Guellich testified he was an orthopedic surgeon, and asserted that any area that is non-orthopedic is outside of his specialty, and would not be covered in his report. (**Joint Exhibit Z - Deposition Transcript of Dr. Guellich Dated 11-01-19**), pgs 17, lines 2-17). Dr. Guellich further indicated that medical evaluations related to constipation and GI would be issues that should be addressed by an internal medicine specialist, not an orthopedic doctor. (**Joint Exhibit Z - Deposition Transcript of Dr. Guellich Dated 11-01-19**), pgs 15-16, lines 25-11).

When asked about a "sleep injury," Dr. Guellich opined the proper specialty would be a psychiatrist or psychologist. (**Joint Exhibit Z - Deposition Transcript of Dr. Guellich Dated 11-01-19**), pg 18, lines 15-21). In reference to dizziness, Dr. Guellich testified the proper specialty would likely be an ear, nose and throat doctor. (**Joint Exhibit Z - Deposition Transcript of Dr. Guellich Dated 11-01-19**), pg 18, lines 2-8).

Given the fact that an orthopedic panel Qualified Medical Evaluator has issued a comprehensive medical-legal report in this case, new medical disputes have arisen in areas the QME opines are outside the scope of his expertise, and QME physicians in different specialties are needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the issuance of the additional panels will not be tantamount to a violation of the law.

To the contrary, during the November 1, 2019 deposition of QME Dr. Guellich, defense counsel indicated "[c]ounsel, let me just for the record state that I agree that any area that is non-orthopedic is outside the doctor's specialty and would not be covered in his report. It's not an area the he should be discussing. If there's any kind of dispute then that would be a completely different set of doctors." (**Joint Exhibit Z - Deposition Transcript of Dr. Guellich Dated 11-01-19**), pg 17, lines 2-7).

Later in the same deposition, while applicant's attorney was attempting to ask QME Dr. Guellich about the disputed body parts, defense counsel stated "[w]ell you're talking about the disputed parts. He's not going to know about that. That would take a different doctor." (**Joint Exhibit Z - Deposition Transcript of Dr. Guellich Dated 11-01-19**), pg 22, lines 2-4). Defense counsel further indicated "...I still say you have a right to go to an internist." (**Joint Exhibit Z - Deposition Transcript of Dr. Guellich Dated 11-01-19**), pg 24, lines 8-9).

As this is a partially admitted claim, the applicant has few options other than to request panel QME's as to the body parts denied by defendant. The medical

reporting and pleadings are consistent with the need, and therefore there is good cause for additional QME's in internal medicine, psychology, and ENT.

IV.

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Petition for Removal filed by defendant, USA Waste of California, Inc., insured by ACE American Insurance, be denied.

DATE: July 19, 2021

Michael J. Holmes

WORKERS' COMPENSATION JUDGE