

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

JOSEPH MEDEIROS, *Applicant*

vs.

**COUNTY OF SONOMA SHERIFF'S DEPARTMENT, permissibly self-insured,
administered by INTERCARE HOLDINGS INSURANCE SERVICES, INC., *Defendants***

**Adjudication Number: ADJ14053906
Santa Rosa District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

We have considered the allegations of defendant's Petition for Removal 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 based upon the WCJ's analysis of the merits of defendant's arguments in the WCJ's report, we will deny the Petition as one seeking reconsideration.

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 (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 the low back. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, defendant is only challenging the WCJ's finding that Andrew Burt, M.D. is the qualified medical evaluator (QME) and the second QME panel is an invalid duplicate panel. These are interlocutory decisions regarding discovery. 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., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, for the reasons stated in the WCJ's report, 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.

Defendant contends that a new QME panel under section 4062.2 was required once applicant became represented. This misconstrues the import of *Romero v. Costco Wholesale* (2007) 72 Cal.Comp.Cases 824. The panel in *Romero* determined that "for purposes of sections 4062.1(e) and 4062.2(e) [...] an employee has 'received' a comprehensive medical-legal evaluation when the employee attends and participates in the medical evaluator's examination." (*Id.* at p. 825.) Since *Romero* "had not attended and participated in an examination by the panel QME when she changed from being not represented by an attorney to being represented, she had not 'received' a comprehensive medical-legal evaluation pursuant to section 4062.1 and is, therefore, not precluded from requesting a new QME panel pursuant to section 4062.2." (*Id.* at p. 828.)

Romero does not require a new QME panel be obtained once an applicant becomes

represented, it merely permits a request for a new panel if the evaluation with the unrepresented panel has not occurred yet. In this matter, applicant had already been evaluated by Dr. Burt from the original QME panel at the time of defendant's panel request. Consequently, the WCJ correctly found that defendant's QME panel was invalid and the parties must continue discovery with Dr. Burt.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration/Removal of the Findings and Order and Opinion on Decision issued by the WCJ on April 27, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 25, 2021

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

**BROWN & DELZELL
JOSEPH MEDEIROS
MULLEN & FILIPPI**

AI/pc

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