WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANIEL HAZEN, *Applicant*

vs.

PORTERVILLE UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by KEENAN & ASSOCIATES, *Defendants*

Adjudication Number: ADJ13462646
Fresno 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 report, portions of which we adopt and incorporate below, and for the reasons discussed below, 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 regarding injury AOE/COE. 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.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Defendant's Petition was timely filed on April 16, 2021. Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory finding/order in the decision regarding whether its April 1, 2020 Notice of Permanent Disability was a valid objection pursuant to Labor Code section 4061 or 4062. (Lab. Code, §§ 4061-4062.) Therefore, the removal standard applies to our review. (See *Gaona, supra*.)

We adopt and incorporate the following excerpts from the WCJ's report:

> **I**
> **INTRODUCTION**
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> This matter proceeded to trial to adjudicate the validity of the qualified medical evaluation panel obtained in response to Defendant, Porterville Unified School District's Notice of Permanent Disability. This Court issued a Findings of Fact, Order and Opinion on Decision Order, (hereinafter "*Findings and Order*") dated April 5, 2021, finding the April 1, 2020, Notice of Permanent Disability was not a valid objection pursuant to Labor Code § 4061 (or Labor Code § 4062), to obtain a panel of qualified medical evaluators and an ordering panel number

2553622 invalidated. Defendant (hereinafter "Petitioner", by and through its attorneys of record, filed a timely Petition for Removal of the *Findings and Order*, asserting this Court abused its discretion by issuing an invalid order. Petitioner also asserts this Court abused its discretion by not addressing the validity of panel number 2584333 which Petitioner obtained after Applicant retained legal counsel. Applicant did not file an Answer by the time this Report issued.

II
BACKGROUND
Facts

Antonio Durazo, M.D., serving as Applicant's primary treating physician, examined Applicant January 16, 2020, issuing a narrative progress report and permanent and stationary PR-4 report with the same date. ***{Joint Exhibits 115 and 116}*** Dr. Durazo's narrative progress report, signed electronically on March 22, 2020, indicates Applicant is permanent and stationary, assessing at 8% WPI for the cervical spine, releasing Applicant to work without restrictions, indicating future medical care needs. ***{Joint Exhibit 116}*** Dr. Durazo's PR-4, also signed March 22, 2020, similarly opines there is permanent disability directly caused by an industrial injury, assessing 8% WPI for the cervical spine and provides limitations for Applicant's ability to return to his usual and customary occupation. ***{Joint Exhibit 115}***

On April 1, 2020, Petitioner's claims examiner Andria Cselovszki, sent Applicant a Notice of Permanent Disability, indicating:

"Your doctor provided advice that you have permanent disability in the report dated 01/16/2020 from Dr. Durazo which is enclosed. Based on the information provided in the report, your permanent disability rating is 8*%.* This rating is equivalent to $6,960.00, which is paid at the weekly permanent disability rate of $290.00 for 24 weeks.

The report indicates that you are in need of future medical care.

Permanent disability payments are not due at this time because you have returned to work receiving 100 percent of your wages at the time of injury. When a settlement or award for benefits is made, your permanent disability payments shall be calculated from the last date of' temporary disability payments, or the date you became permanent and stationary, whichever is earlier.

You and I both have the right to disagree with the physician's findings and request a comprehensive medical evaluation. I disagree with the physician's findings.

We are not requesting the report of your treating physician be rated for permanent disability by the Disability Evaluation Unit (DEU). If you are unrepresented, you may contact tl1e [*sic*] Information and Assistance officer to have tl1e report reviewed and rated by the DEU.

The determination of permanent disability is based on the evaluation of treating physician Dr. Durazo dated 01/16/2020. I disagree with the results of the evaluation.

Please contact Andria Cselovszki at 9168597160 ext. 4116 to request the form to submit to tl1e [*sic*] state Division of Workers' Compensation (DWC) to request a panel of three Qualified Medical Evaluators (QMEs), or you may download the form from the DWC website http://www.dir.ca.gov.dwc/FORMS/QMEForms/QMEForm105.pdf. Instructions for completion of the form are found here:

http://www.dor.ca.gov/dwc/FORMS/QMEForms/QMEForm105-Instructions.pdf.

You must notify me in writing of your objection to the determination of the treating physician within thirty (30) days of the date you received the treating physician's report." ***{Joint Exhibit 114}***

III
DISCUSSION

…

B. Validity of Panel Number 2553622

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274,281, fn.) 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., Title 8, § 10955(a).) The petitioner also must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., Title 8, § 10955(a).) Here, Petitioner asserts it will be significantly prejudiced and irreparably harmed by the *Findings and Order*. While Petitioner restates the Court's finding of fact, that the April 1, 2020, Notice of Permanent Disability was invalid basis to support a request for panel of qualified medical evaluators, Petitioner fails to proffer facts or evidence demonstrating either prejudice or harm by this finding. Therefore, the Petition should be denied.

Moreover, the legislature has differentiated objections to a medical determination made by the treating physician concerning the existence or extent

of permanent impairment and limitations or the need for future medical care, as set forth on Labor Code § 4061, versus objections to a medical determination made by the treating physician concerning any medical issues not covered by Labor Code §§4060 or 4061, and not subject to Labor Code §4610. While both roads lead to an unrepresented employee *in propia persona* obtaining a comprehensive evaluation by the procedure provided in Labor Code § 4062.1, the basis of the objection is relevant so that the parties, as well as the selected panel QME, have a clear indication as to what issues are contested and therefore being submitted for the selected and/or designated QME to evaluate. Clarity as to the specific disputed issue, or issues, are of particularly *more* significance when an unpresented employee is maneuvering through the comprehensive medical legal dispute process on his or her own. Here, Petitioner's April 1, 2020, Notice of Permanent Disability failed to specifically delineate which of Dr. Durazo's findings or results Petitioner disagreed with. The Notice, merely indicating the examiner's blanket disagreement with the physician's findings and results of the evaluation, failed to place Applicant, while *in propia persona,* on sufficient notice as to what, or which, findings or results Petitioner disagreed. Applicant's inability to appreciate or distinguish which of Dr. Durazo's findings or results Petitioner is purporting to be in disagreement with, is evident in Applicant's April 11, 2020, email to Petitioner. ***{Joint Exhibit 113}*** Applicant's inability to appreciate or distinguish which of Dr. Durazo's findings or results Petitioner is purporting to be in disagreement with, is also evident in Applicant's QME Form 105 explanation as to why he is requesting a panel wherein he describes the basis of the request due to "treating physician Dr. Durazo evaluation of permanent and stationary with future medical return to customary occupation -Keenan disagrees with treating physicians findings" which was submitted to the DWC Medical Unit. ***{Joint Exhibit 112}*** Petitioner's April 1, 2020, Notice of Permanent Disability, failed to set forth sufficient identifiable factors to constitute a valid objection pursuant to Labor Code § 4061, to base a request for a panel while Applicant was unrepresented.

C. Validity of Replacement Panel Number 2584333

Petitioner avers the Court did not address the validity of replacement panel number 2584333. However, the parties did not identify the issue of the validity of replacement panel. Labor Code § 4062.1 determines the procedure for an unrepresented worker to choose a QME from a panel issued by the Medical Unit. Applicant was originally unrepresented when panel number 2553622 was requested and issued. ***{Joint Exhibit 111}*** Applicant represented by counsel on June 22, 2020. Applicant's attorney requested Petitioner provide all medical records in Petitioner's possession and demanded Petitioner serve the office with the panel QME process paperwork, including the PTP objection letter, the panel request and the panel list. ***{Joint Exhibit 107}*** Having failed to respond to Applicant attorney's request for documents relating to the panel QME process, Petitioner submitted a Replacement Request to the DWC Medical Unit indicating "Replacement panel is requested based on the Romero case. Claimant

> has become represented as of June 22, 2020. The original panel was issued while the claimant was pro per and he has NOT been evaluated by any of the doctors on the original panel." ***{Joint Exhibit 106}*** The DWC Medical Unit issued panel number 2584333, in response to Petitioner's request. On July 30, 2020, after still having failed to serve Applicant's attorney with documents related to the initial panel QME process, Petitioner served Applicant's attorney with a copy of panel number 2584333. ***{Joint Exhibits 102 & 103}.***
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> Labor Code § 4062.2 governs medical-legal evaluations when an injured worker has an attorney. No earlier than the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. (Labor Code § 4062.2 (b)) Here, the evidence demonstrates Petitioner failed to serve Applicant's attorney with an objection pursuant to either Labor Code § 4061 or 406,even after Applicant's attorney made a specific request for the documents, before seeking a panel pursuant to Labor Code §4062.2.
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> (WCJ's Report, April 30, 2021, pp. 1-5.)

As noted by the WCJ, the record does not clearly reflect that the validity of the second QME panel (number 2584333) was specifically raised at the trial level. The issue at trial was stated as: "The validity of the PQME process; whether there was a valid objection to trigger the Panel QME process; with the Applicant contending that the Permanent Disability Notice was deficient because it failed to sufficiently describe the dispute." (Minutes of Hearing; Summary of Evidence, February 11, 2021, p. 2.) "It is improper to seek reconsideration on an issue not presented at the trial level." (*Cottrell v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 760, 761 (writ den.).)

To the extent the validity of the second QME panel was raised at trial, we agree with the WCJ that the panel is invalid. As outlined by the WCJ in her Report, the second QME panel was issued in response to defendant's July 1, 2020 replacement panel request after applicant became represented. If the employee is represented by an attorney, section 4062.2 provides the procedure to obtain a QME panel. (Lab. Code, § 4062.2.) Section 4062.2 provides, in relevant part, as follows:

> (a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.

> (b) No earlier than the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060 or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. The party submitting the request shall designate the specialty of the medical evaluator, the specialty of the medical evaluator requested by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. The party submitting the request form shall serve a copy of the request form on the other party.
>
> (Lab. Code, § 4062.2(a)-(b).)

In *Romero v. Costco Wholesale* (2007) 72 Cal.Comp.Cases 824,[1] the Appeals Board analyzed the application of sections 4062.1 and 4062.2 when an employee is unrepresented when a QME panel issues, but then becomes represented before receiving an evaluation by a physician from the panel. The Appeals Board 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." (*Romero*, *supra*, 72 Cal.Comp.Cases 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, emphasis added.)

In this matter, although either party was entitled to request a *new* QME panel once applicant became represented since he had not received an evaluation by a physician from the first QME panel, the requesting party must obtain a new panel in accordance with the process outlined in section 4062.2. Defendant did not send applicant an objection pursuant to section 4061 or 4062[2] prior to submitting its request for a "replacement panel" to the Medical Unit. Accordingly, the second QME panel was not validly obtained pursuant to section 4062.2.

Therefore, we will deny defendant's Petition.

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[1] *Romero* was designated a significant panel decision. A significant panel decision is one that is identified for dissemination by the Appeals Board in order to address new or recurring issues of importance to the workers' compensation community. Significant panel decisions have been reviewed by each of the commissioners, who agree that the decision merits general dissemination. (Cal. Code Regs., tit. 8, § 10325(b).)

[2] Since the claim is partially accepted, section 4060 is not applicable. (Lab. Code, § 4060(a).)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact, Order and Opinion on Decision issued by the WCJ on April 5, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 27, 2022

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

BRYAN LEISER
DANIEL HAZEN
MICHAEL SULLIVAN & ASSOCIATES

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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.
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