

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

YESENIA CASAREZ, *Applicant*

vs.

**THE CHEESECAKE FACTORY; ACE AMERICAN INSURANCE COMPANY,
administered by CORVEL CORP., *Defendants***

**Adjudication Number: ADJ11969576
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of our September 12, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, wherein we granted applicant's July 14, 2023 Petition for Reconsideration of the June 16, 2023 Findings and Award and Orders (FA&O) of the worker' compensation judge (WCJ), rescinded the FA&O, and substituted a new F&A finding that applicant sustained injury to her low back and left elbow, but not to her hip, and that injury to all other body parts is deferred and that applicant is entitled to an additional panel in internal medicine.

We have not received an Answer from any party.

We have considered the allegations of the Petition for Reconsideration, and we have reviewed the record in this matter. For the reasons discussed below, we will deny defendant's Petition for Reconsideration.

FACTS

Applicant claimed industrial injury to her arm, back, circulatory system, worsening of hypertension, and blood infection due to a fall on February 6, 2019, while employed by defendant doing food prep. She cut her elbow during the fall, developed a fever soon after the fall, and was diagnosed with a blood infection. (12/21/22 Minutes of Hearing/Summary of Evidence (MOH/SOE), p. 4.)

In the Primary Treating Physician's (PTP) Progress Report (PR-2 Report) of January 25, 2021, PTP Dr. Shahab Mahboubian, D.O., in orthopedic surgery, discussed applicant's lumbar spine, left elbow, and left hip and also made a specialty referral for an internal medicine evaluation and treatment. (Ex. 2, PR-2 Report, pp. 1-3.) Dr. Mahboubian stated "The patient will [be] referred for evaluation and/or diagnostic testing in the capacity of internal medicine evaluation and/or testing per MTUS GUIDES 8 C.C.R. § 9792.20-9792.26 Page 1 of 127, 'If the complaint persists, the physician needs to reconsider the diagnosis and decide whether a specialist evaluation is necessary.'" (Ex. 2, p. 3.)

On February 20, 2021, Dr. Mahboubian completed a Request for Authorization (RFA) for an internal medicine evaluation and treatment. (Ex. 3, RFA, pp. 1-2.) Dr. Mahboubian again stated "The patient will referred for evaluation and/or diagnostic testing in the capacity of internal medicine evaluation and/or testing per MTUS GUIDES 8 C.C.R. § 9792.20-9792.26 Page 1 of 127, 'If the complaint persists, the physician needs to reconsider the diagnosis and decide whether a specialist evaluation is necessary.'" (Ex. 3, p. 2.) Defendant denied the RFA on April 14, 2021. (Ex. A, RFA denial letter, p. 1.)

Agreed Medical Evaluator (AME) in orthopedic surgery Dr. Peter M. Newton, M.D., conducted an orthopedic evaluation of applicant on February 24, 2021. (Ex. X1, AME Report of Dr. Newton dated 2/24/21.) Applicant disclosed her injury and treatment to him, including the infection in her elbow. (Ex. X1, p. 3.) Dr. Newton also noted that applicant had high blood pressure, which was controlled with medication, and that she suffered from depression, anxiety, stress, headaches, and sleep disturbances due to her injuries. (Ex. X1, pp. 7-8.) After Dr. Newton re-examined applicant on May 18, 2021, he found her permanent and stationary. (Ex. X2, AME Report of Dr. Newton dated 5/19/21, p. 12.)

In his deposition of March 16, 2022, Dr. Newton stated that he did not discuss with the applicant or review anything related to her elbow laceration, blood, or infection as part of his orthopedic medical-legal evaluation. (Ex. X4, deposition of Dr. Newton dated 3/16/22, p. 22.) Dr. Newton also did not discuss applicant's complaints of depression, anxiety, stress, headaches and sleep disturbances with her and he did not consider referring her out for those complaints. (Ex. X4, p. 23.) In Dr. Newton's AME supplemental report of May 24, 2022, he stated that he reviewed applicant's deposition where she discussed the infection in her elbow. (Ex. X3, AME Report of

Dr. Newton dated May 24, 2022, p. 3.) He also reviewed an emergency room documentation on February 17, 2019, regarding the laceration on her elbow. (Ex. X3, p. 5.)

In the Pre-Trial Conference Statement (PTCS) of December of December 21, 2022, the parties noted that the body parts of left hip, hypertension, and blood infection were issues for trial as well as whether applicant was entitled to an additional Panel Qualified Medical Evaluator (PQME) in internal medicine. (12/21/22 PTCS, p. 3.)

At the trial on December 21, 2022, the parties stipulated that applicant sustained injuries arising out of and in the course of employment to her back and left elbow. (12/21/22 MOH/SOE, p. 2.) The issues for trial included body parts and applicant's request to develop the record and request for an additional panel in internal medicine. (12/21/22 MOH/SOE, p. 2.) Applicant had been diagnosed with hypertension and was taking hypertension medication prior to the injury; however, her medication increased from 10 mg to 20 mg and eventually to 40 mg following the injury. (12/21/22 MOH/SOE, p. 6.) She also acknowledged that she was off the medication because her doctor told her that the hypertension had stabilized and she could stop the medications. (6/8/23 MOH/SOE, p. 3.) At the conclusion of the trial, the WCJ found that applicant sustained industrial injury to her low back and left elbow, including cellulitis but that she had not sustained industrial injury to her hips or hypertension. (FA&O, Findings of Fact 1 & 2.) The WCJ also denied applicant's motion to develop the record. (FA&O, p. 3.)

On July 14, 2023, applicant filed a Petition for Reconsideration of the FA&O of June, 16, 2023. Applicant contended that her injuries supported an additional PQME in the specialty of internal medicine and that the record should be further developed. Defendant filed an Answer and the WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be dismissed, or in the alternative denied.

We granted applicant's Petition for Reconsideration, rescinded the FA&O, and substituted a new F&A finding that applicant sustained injury to her low back and left elbow, but not to her hip, and that injury to all other body parts is deferred and that applicant is entitled to an additional panel in internal medicine. We made no substantive changes to the findings that applicant was entitled to temporary disability indemnity and attorney's fees thereon and future medical care, and we deferred all other issues.

DISCUSSION

Preliminarily, we observe that our decision includes findings regarding final issues and interlocutory issues. 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, 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.

Accordingly, our decision is a final order subject to reconsideration rather than removal. However, defendant is only challenging an interlocutory finding/order in the decision. 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, § 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, 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.

Turning to the merits of defendant's petition, defendant contends that applicant did not make a diligent good faith effort to obtain a PQME in internal medicine and that there was no evidence of a dispute to warrant a PQME in internal medicine.

First, applicant exercised due diligence in repeatedly requesting the additional PQME and was therefore not in violation of Labor Code section 5502. (Lab. Code, § 5502(d)(3).) Applicant requested the additional PQME multiple times throughout this case, including before and at trial. (12/21/22 PTCS, p. 3; 12/21/22 MOH/SOE, p. 2.)

Further, there was a dispute that necessitated an additional PQME in internal medicine. If an additional QME panel in a different specialty is necessary, Administrative Director (AD) Rule 31.7 provides, 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:

(1) A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or

...

(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.)

There was evidence of a dispute. Defendant denied the industrial nature of the additional claimed conditions (12/21/22 MOH/SOE, p. 2) and denied the RFA for referral to a consulting physician. (Ex. A, p. 1.) Applicant could not obtain additional evaluations pursuant to AD Rule 31.7(b)(1) as defendant would not agree to the additional PQME and therefore had to rely on the

WCJ to order the additional PQME pursuant to AD Rule 31.7(b)(3). Defendant cannot use its own stonewalling of appropriate discovery to block the necessary development of the full record.

In our September 12, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, we concluded that good cause existed for a PQME in internal medicine. Applicant claimed industrial injury to her arm, back, circulatory system, worsening of hypertension, and blood infection. (FA&O, Findings of Fact 1 & 2.) PTP Dr. Mahboubian recommended a specialty referral for an internal medicine evaluation and treatment. (Ex. 2, pp. 1-3; Ex. 3, pp. 1-2.) Thus, substantial evidence supports the necessity of the additional PQME panel in internal medicine, and we conclude that defendant has not demonstrated that significant prejudice or irreparable harm will result from our decision to order the panel, and/or that reconsideration will not be an adequate remedy.

Accordingly, we deny defendant's Petition for Reconsideration of our September 12, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of our September 12, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 5, 2023

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

**YESENIA CASAREZ
LAW OFFICES OF ARMEN YEDALYAN
ACUMEN 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*