

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

GERARDO GOMEZ, *Applicant*

vs.

**PAGLIRO CONSTRUCTION, INC.; WISCONSIN INSURANCE COMPANY,
administered by NEXT LEVEL ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ13544485
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION**

Defendant seeks removal or in the alternative reconsideration of the Findings of Facts and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 8, 2021. By the F&O, the WCJ found that defendant is not entitled to an additional qualified medical evaluator (QME) panel in internal medicine and set the matter for a mandatory settlement conference on all issues.

Defendant contends that the F&O denied its right to due process by precluding defendant from conducting discovery regarding applicant's claim of injury to his internal system. Defendant also contends that setting the matter for a mandatory settlement conference violates Labor Code¹ section 4061(i).

We received an answer from applicant. The WCJ issued a Report and Recommendation on Defendant's Petition for Removal/Reconsideration (Report) recommending that we deny the Petition.

We have considered the allegations of defendant's Petition for Removal/Reconsideration, applicant's answer 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 grant the Petition as one seeking reconsideration, rescind the F&O and issue a new decision finding that defendant is entitled to an

¹ All further statutory references are to the Labor Code unless otherwise stated.

additional QME panel in internal medicine.

FACTUAL BACKGROUND

Applicant claims injury to the chest (blood clot), circulatory system, left knee, lumbar spine and thoracic spine on July 3, 2020 while employed as a framer by Pagliro Construction, Inc. Defendant has accepted the left leg and left knee as compensable, but disputes injury arising out of and in the course of employment (AOE/COE) to the other body parts.

On October 6, 2020, defendant sent a letter to applicant objecting to the reporting of the primary treating physician (PTP), Dr. Ronald Zlotolow, and advising that a medical-legal evaluation was necessary. (Applicant's Exhibit No. 1, Defense objection per Labor Code section 4061/4062 to reports of Dr. Ronald Zlotolow, October 6, 2020, exh. p. 4.) Defendant requested and obtained a QME panel in orthopedic surgery pursuant to its objection. (*Id.* at exh. p. 1.)

Richard Feldman, M.D. evaluated applicant on January 25, 2021 as the orthopedic panel QME. (Applicant's Exhibit No. 2, QME Report of Dr. Richard Feldman, January 25, 2021.) In his report, Dr. Feldman stated in relevant part:

Approximately three weeks after the fall, he felt the sudden onset of chest pain. He sought medical care at Martin Luther and underwent CT scan. He was found to have some type of blood in his chest. He was released from the hospital without medications prescribed. He was advised on taking aspirin which he is currently on.

It appears from the provided reports of the consulting internist, Dr. Zlotolow that the chest pain is a coagulation defect, possibly involving the abdominal aorta. From my 30 years of experience as an orthopedic surgeon, I have not encountered this type of cardiovascular condition from a fall of 10 feet. I did note from the applicant's deposition, he was told by the doctor at Martin Luther King hospital that the reported chest pain resulting from the fall was very unlikely. Nonetheless, this is out of my area of specialty in orthopedics. I will defer discussion of all WC related issues to a cardiovascular specialist.

(*Id.* at pp. 18-19.)

In a supplemental report dated May 25, 2021, Dr. Feldman further stated:

The subsequent records from Martin Luther King Hospital dating from 07 /24/20 to 07/28/20 confirms the applicant's narration and testimony in regard to his abdominal pain felt few weeks from the date of fall on 07 /03/20. But then again, beyond my observation that there was no mention of the fall by any of the

medical providers in relation to the diagnosis of celiac artery, I defer comment on this non-orthopedic condition to the appropriate PQME in the field of internal medicine.

(Applicant's Exhibit No. 3, QME Report of Dr. Richard Feldman, May 25, 2021, p. 12.)

On April 8, 2021, defendant sent applicant a letter objecting to reporting by Dr. Zlotolow. (Defendant's Exhibit C, Objection to PTP MMI Report of Dr. Ronald Zlotolow, April 8, 2021.)² A second letter objecting to Dr. Zlotolow's March 25, 2021 report was sent by defendant on May 5, 2021. (Defendant's Exhibit B, Objection to PTP MMI Report of Dr. Ronald Zlotolow, May 5, 2021.)

On July 8, 2021, defendant filed a Petition for the Medical Unit to Issue Internal (MMV) Panel QME. (Defendant's Exhibit A, Petition for Additional Panel in Internal Medicine, July 8, 2021.)

The matter proceeded to trial on October 19, 2021. The parties stipulated at trial to injury AOE/COE to the left leg and left knee. (Minutes of Hearing and Summary of Evidence, October 19, 2021, p. 2.) The sole issue at trial was identified as entitlement to additional panel. (*Id.*)

The WCJ issued the F&O as outlined above. The rationale for the F&O was provided in the Opinion on Decision as follows:

Defendant's trial brief indicates that they have a medical report from a prior PTP, Dr. Arnush, addressing causation of the internal complaints, and therefore, there is not good cause for Defendant to obtain an additional QME panel in internal medicine pursuant to California Code of Regulation §31.7.

(Opinion on Decision, November 8, 2021, p. 1.)

DISCUSSION

I.

Defendant sought removal or in the alternative reconsideration 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).)

² The evidentiary record does not include the reporting from Dr. Zlotolow that defendant objected to.

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 the left leg and left knee. 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, defendant is only challenging an interlocutory finding/order regarding whether it is entitled to an additional QME panel in 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, § 10955(a); *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 the chest (blood clot) and circulatory system. Defendant disputes compensability for these body parts. 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 agreed medical evaluator (AME). (Lab. Code, § 4062.2.) In the absence of an additional panel in internal medicine, defendant is prevented from conducting necessary medical-legal discovery to determine compensability for the alleged injury to the chest and circulatory system. We therefore agree with defendant that an additional QME panel in internal medicine is warranted. (See *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].)

The WCJ in the Opinion on Decision suggests that since there is an existing report from a treating physician addressing causation for the internal system that there is no good cause for an additional QME panel. Either party may offer reports from a treating physician as evidence

regarding an issue in dispute, including a dispute with respect to causation. (See Lab. Code, §§ 4060(b), 5703(a).) However, neither party is obligated to accept the findings of the treating physician regarding causation. The Labor Code expressly provides a process for either party to object to a medical determination by a treating physician and request a medical-legal evaluation from a panel QME to address the dispute. (See e.g., Lab. Code, §§ 4061(b), 4062(a), 4062.2.) Defendant's prior exercise of its right to a QME panel to address the orthopedic parts does not constitute a waiver of its right to seek an additional QME panel in another specialty to address the internal medicine parts pled, particularly, where, as here, the orthopedic QME has expressly deferred causation for these parts to a specialist in internal medicine.

Therefore, we will grant reconsideration, rescind the F&O and issue a new decision finding that defendant is entitled to an additional QME panel in internal medicine. The new decision will retain the parties' trial stipulations that were adopted in the F&O (Findings of Fact Nos. 1-2).³ (Minutes of Hearing and Summary of Evidence, October 19, 2021, p. 2; see Lab. Code, § 5702; see also *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].)

Since additional discovery will presumably be conducted by the parties, this matter is not currently in a posture for proceeding to a mandatory settlement conference on all issues. Defendant's contentions regarding section 4061(i) will thus not be addressed as the issue is moot.

³ We do not retain Findings of Fact Nos. 3-17, which outlined the procedural history of this case and are more fittingly placed in the Opinion on Decision rather than as individual findings of fact in this matter.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Facts and Orders issued by the WCJ on November 8, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Facts and Orders issued by the WCJ on November 8, 2021 is **RESCINDED** in its entirety and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Gerardo Gomez while employed on July 3, 2020 as a framer as a Framer at Los Angeles, California, by Pagliro Construction/Shiftable HR, sustained injury arising out of and in the course of employment to the left leg and left knee.
2. At the time of the injury, the employer's workers' compensation carrier was United Wisconsin Insurance Company, administered by Next Level Administrators.
3. Defendant is entitled to an additional QME panel in internal medicine – cardiovascular disease (MMV).

ORDER

IT IS ORDERED that defendant's request for an additional QME panel in the specialty of internal medicine – cardiovascular disease (MMV) is granted.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 21, 2022

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

**GERARDO GOMEZ
HINDEN & BRESLAVSKY
STANDER REUBENS THOMAS KINSEY**

AI/pc

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