

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

CHRISTINA DELOZA, *Applicant*

vs.

**COUNTY OF SONOMA, permissibly self-insured,
administered by INTERCARE INSURANCE SERVICES, *Defendants***

**Adjudication Number: ADJ11443278
Santa Rosa District Office**

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted defendant's Petition to further study the factual and legal issues in this case. Although defendant sought removal, the WCJ's ruling resolves threshold issues pursuant to the provisions of Labor Code section 4062.5 and Administrative Director Rule 38(b);¹ thus, defendant's Petition is deemed a petition for reconsideration. This is our Opinion and Decision After Reconsideration.²

Defendant seeks reconsideration of the Minute Orders (Orders) issued by the workers' compensation administrative law judge (WCJ) on September 28, 2021, wherein the WCJ barred the report of orthopedic qualified medical examiner (QME) Joseph McCoy, Jr., M.D., from being provided to replacement QME Michael D. Ciepela, M.D., for his review, and ordered that the report from Dr. McCoy was "inadmissible for any purpose."

Defendant contends that the report from Dr. McCoy should be provided to Dr. Ciepela for his review or in the alternative that Dr. Ciepela should be provided Dr. McCoy's test results.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

¹ For example, the parties' liability for payment of the medical-legal examination fees. (Lab. Code, § 4062.5.)

² As noted, we previously granted the Petition to allow further study of the factual and legal issues. Commissioners Sweeney and Lowe, who were members of the panel have since retired and other panel members have been assigned in their place.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the Orders and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her bi-lateral shoulders while employed by defendant as a Home Care Support specialist on August 24, 2015. According to the pleadings filed by the parties and the Workers' Compensation Judge's Report, On March 22, 2021, applicant was evaluated by QME Dr. McCoy. At the June 30, 2021, Expedited Hearing, the WCJ ordered the Medical Unit to issue a replacement panel. (See (Minutes of Hearing (MOH) June 30, 2021, p. 2.) Applicant objected to the report from Dr. McCoy being sent to replacement QME Dr. Ciepiela, and the WCJ's September 28, 2021, ruling as to that objection is at issue herein.

DISCUSSION

Preliminarily, we observe that 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.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner 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, based upon the WCJ's analysis of the merits of the petitioner's arguments, 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

However, we note that that the record of proceedings in this matter does not contain a trial record regarding the September 28, 2021, Expedited Hearing. The adjudication file does not contain a Minutes of Hearing and Summary of Evidence, there are no stipulations and/or issues identified, and there is no evidence admitted into the record.

“[T]he record of proceedings in a case submitted for decision on the record must be properly organized and must contain at the minimum: a list of the issues submitted to the WCJ for decision; the stipulations of the parties, if any; and the admitted evidence.” (*Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 474 (Appeals Board *en banc*)). “The evidence submitted by the parties must be formally admitted and must be included in the record to enable the parties to comprehend the basis for the decision. Furthermore, a proper record enables any reviewing tribunal, be it the Board on reconsideration or a court of further appeal, to understand the basis for the decision.” (*Hamilton, supra*, 475.)

The Labor Code and the Appeals Board rules contain explicit instructions concerning the contents of the record of a case. (Lab. Code, § 5502; Cal. Code Regs., tit. 8, § 10759(b) and (c) [prior § 10629].) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record.” (*Hamilton, supra*, 477.)

As discussed above, at a minimum, the trial record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence. Here, there is no trial record, so we are not able to address the issues raised by the Petition or those discussed by the WCJ in the Report. Thus, we must rescind the Order and return the matter to the WCJ.

Regarding the issues raised by the parties, Labor Code section 4062.5 states in part:

If a qualified medical evaluator selected from a panel fails to complete the formal medical evaluation within the timeframes established by the administrative director pursuant to paragraph (1) of subdivision (j) of Section 139.2, a new evaluation may be obtained upon the request of either party, as provided in Sections 4062.1 or 4062.2.
(Lab. Code, § 4062.5)

Pursuant to Administrative Director Rule 38:

(a) The time frame for an initial or a follow-up comprehensive medical-legal evaluation report to be prepared and submitted shall not exceed thirty (30) days after the QME, Agreed Panel QME or AME has seen the employee or otherwise commenced the comprehensive medical-legal evaluation procedure.

(b) If an evaluator fails to prepare and serve the initial or follow-up comprehensive medical-legal evaluation report within thirty (30) days and the evaluator has failed to obtain approval from the Medical Director for an extension of time pursuant to this section, the employee or the employer may request a QME replacement pursuant to section 31.5 of Title 8 of the California Code of Regulations.

(Cal. Code Regs., tit. 8, § 38.)

Administrative Director Rule 31.5 states:

(a) A replacement QME to a panel, or at the discretion of the Medical Director a replacement of an entire panel of QMEs, shall be selected at random by the Medical Director and provided upon request whenever any of the following occurs: ...

(12) The evaluator failed to meet the deadlines specified in Labor Code section 4062.5 and section 38 (Medical Evaluation Time Frames) of Title 8 of the California Code of Regulations and the party requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report. ...

(Cal. Code Regs., tit. 8, § 31.5.)

If, as asserted by applicant, Dr. McCoy did not timely prepare and/or submit his initial medical-legal report, it was appropriate for applicant to request a replacement panel and for applicant to be examined by QME Dr. Ciepiela. However, Administrative Director Rule 35, subsection (e) states that, “In no event shall any party forward to the evaluator: (1) any medical/legal report which has been rejected by a party as untimely pursuant to Labor Code section 4062.5” (Cal. Code Regs., tit. 8, § 35.)

Clearly, these are factors to be considered by the parties upon return of this matter to the WCJ.

Accordingly, we rescind the Orders and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 28, 2021 Minute Orders are **RESCINDED**, and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 21, 2023

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

**CHRISTINA DELOZA
KNEISLER & SCHONDEL
MULLEN & FILIPPI, LLP**

TLH/mc

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