WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARILYN SIMI, ***Applicant,*** **vs.** **SAV-MAX FOODS, INC;** **SPRINGFIELD INSURANCE COMPANY,** ***Defendant(s).***	**Case No. SAC 323226** **OPINION AND DECISION AFTER REMOVAL (EN BANC)**

In an "Order Compelling Attendance at Defense Qualified Medical Examination [QME] and to Suspend Benefits" of July 27, 2004, the Workers' Compensation Administrative Law Judge (WCJ) ordered the applicant to attend a defense QME with Dr. Pfeffinger on August 10, 2004.

Applicant filed a Petition for Reconsideration/Removal, contending in substance that the WCJ's order is without legal authority because Senate Bill (SB) 899 (Stats. 2004, ch. 34), enacted April 19, 2004, deleted the provisions of Labor Code sections 4061 and 4062[1] which authorized the procedure for obtaining QME medical-legal reports in cases involving employees who were represented by attorneys and who had sustained injuries prior to January 1, 2005.

Defendant filed an answer.

The petition for reconsideration was dismissed because it was not taken from a final order. However, the petition for removal was granted to further study the issues. Because of the important legal issues presented, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, has assigned this case to the

[1] All further statutory references are to the Labor Code.

Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[2] We hold that for injuries occurring prior to January 1, 2005, section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which Agreed Medical Evaluation (AME) and QME medical-legal reports are obtained in cases involving represented employees.

BACKGROUND

Applicant submitted a claim form to the employer, claiming that she sustained an injury to her right foot on December 10, 2002. Defendant initially denied the claim but eventually accepted liability after obtaining an "AOE/COE report" from Dr. Michael A. Uro, a podiatrist. This report was dated "March 2003" and was served on applicant's attorney on April 18, 2003. Applicant underwent surgery on August 22, 2003, performed by Dr. Barry Weiner, also a podiatrist. On September 23, 2003, applicant filed an Application for Adjudication of Claim alleging cumulative trauma (CT) injury to her right foot/ankle during the period 1996 through December 10, 2002. At the hearing of October 23, 2003, the parties stipulated that applicant, while employed as a bakery/deli worker, sustained "cumulative through September 5, 2002" to her right foot/ankle, causing periods of temporary disability. The parties also stipulated that Dr. Weiner was the primary treating physician.

On February 23, 2004, Dr. Weiner observed that applicant was having problems with a "Baker's cyst" in the left knee. In a report dated March 23, 2004, Dr. Weiner apparently requested referral to a physician for treatment of the left knee on an industrial basis.[3] On April 5, 2004, defendant objected to Dr. Weiner's recommendation of treatment of the left knee and sought agreement with applicant's attorney on an AME. There was no agreement, and on May 19, 2004 defendant notified applicant and her attorney of a defense QME exam with Dr. Pfeffinger scheduled for August 10, 2004. Defendant's notification letter stated that the QME exam was

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[2] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

[3] Dr. Weiner's report dated March 23, 2004 is not found in the Appeals Board's file. The statement that the report contained a request for a referral to treat the left knee is based on what the parties have represented in their pleadings herein.

being set "[i]n accordance with Section 4060 et. seq. of the Labor Code…" On July 6, 2004, applicant's attorney notified defendant's attorney by letter that applicant would not be attending the appointment with Dr. Pfeffinger. The letter asserted that Dr. Weiner had declared applicant permanent and stationary (P&S) and that the doctor "is no longer reporting that the [right] foot cannot be made [P&S] until the [left] knee problem is taken care of…your client is now limited to a re-evaluation with Dr. Uro, DPM." In a report dated May 27, 2004, Dr. Weiner found applicant P&S as to the right foot, but Dr. Weiner also stated that she was not P&S with respect to the Baker's cyst in the left knee, which "needs to be addressed."

On July 22, 2004, defendant filed a Petition to Compel Attendance at Defense QME and to Suspend Benefits. Applicant filed an objection and a Declaration of Readiness to Proceed, again asserting that defendant must return to Dr. Uro, and citing *Alie v. American Home Assurance Co*. (2000) 28 Cal. Workers' Comp. Rptr. 17 in support. On July 27, 2004, the WCJ issued the "Order Compelling Attendance at Defense QME and to Suspend Benefits" disputed here. In addition to the order to compel, the WCJ's ruling stated that an order "may issue suspending the applicant's right to maintain any further proceedings and suspending the applicant's right to disability payments as of the date of the QME should applicant fail to attend."[4]

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[4] Section 4053 provides, "[s]o long as the employee, after written request of the employer, fails or refuses to submit to such examination or in any way obstructs it, his right to begin or maintain any proceeding for the collection of compensation shall be suspended." Section 4054 provides, "[i]f the employee fails or refuses to submit to examination after direction by the appeals board, or a referee thereof, or in any way obstructs the examination, his right to the disability payments which accrue during the period of such failure, refusal or obstruction, shall be barred." The former statute involves *suspension of the right to pursue collection of compensation* where the employee refuses the *employer's written request* for examination, while the latter statute involves *the barring of disability payments* where the employee refuses an examination *directed by a WCJ or the Appeals Board*. Although we will affirm the ruling that applicant must attend the defense QME, we will rescind the threatened enforcement because it confuses sections 4053 and 4054. Upon remand, the WCJ may take action as necessary or appropriate, noting the distinctions between the two statutes.

DISCUSSION

From 1991 through 2003, and before their substantial amendment by SB 899 (Stats. 2004, ch. 34), Labor Code sections 4061 and 4062 provided an established procedure for resolving medical-legal disputes in workers' compensation cases.[5] Thus, in *Keulen v. Workers' Comp. Appeals Bd.* (1998) 66 Cal. App. 4th 1089, 1096 [63 Cal. Comp. Cases 1125, 1130] the Court observed that "Sections 4061 and 4062 concern admitted injuries where issues such as appropriate medical treatment, temporary or permanent disability or vocational rehabilitation exist..." The statutes governed the legal procedure by which medical disputes were resolved or litigated by allowing the parties to object to a treating physician's determination, and either refer the dispute to an AME or allow the objecting party to obtain a QME report.

Under former section 4062, there is no question that defendant, in this case, would have been entitled to a defense QME in rebuttal to the treating physician's recommendation that the left knee be treated in connection with the admitted right foot injury. (See *Gaytan v. Workers' Comp. Appeals Bd.* (2003) 109 Cal. App. 4th 200 [68 Cal. Comp. Cases 693]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236]; *Ordorica v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 1037 [66 Cal. Comp. Cases 333]; *Tenet/Centinela Hosp. v. Workers' Comp. Appeals Bd. (Rushing)* (2000) 80 Cal.App.4th 1041 [65 Cal. Comp. Cases 477]; *Hines v. New United Motors Manufacturing, Inc.* (2001) 66 Cal. Comp. Cases 478 [Appeals Board en banc].)

In 2003, and effective January 1, 2004 through April 18, 2004, section 4062 was repealed and replaced to include utilization review for spinal surgery under Labor Code section 4610. However, the same procedure for obtaining AME and QME medical-legal reports that had been in effect since 1991 under the antecedent section 4062 was retained in the 2003 version of the statute.

Then, effective April 19, 2004, former section 4062 was amended by SB 899. As amended, section 4062(a) now provides, in relevant part, that for represented employees "a

[5] This case involves section 4062 because the injured worker is represented by an attorney and the employer objects to a medical determination made by the treating physician concerning the extent and scope of medical treatment, i.e., the recommendation for treatment of the left knee on an industrial basis.

medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained." In turn, section 4062.2 as amended by SB 899 still allows the parties to agree on an AME but creates a new procedure that eliminates a party's right to select a QME of its choice, substituting a panel QME procedure. However, subdivision (a) of section 4062.2 provides that the statute applies to injured employees who are represented by attorneys and whose disputes arise out of injuries or claimed injuries occurring on or after January 1, 2005. Thus, the Legislature created a new procedure for obtaining medical-legal reports for injuries on or after January 1, 2005, but it did not retain any procedure for injuries before January 1, 2005.

We considered a similar issue in *Godinez v. Buffets, Inc.* (2004) 69 Cal. Comp. Cases 1311 [Significant Panel Decision]. There we found that defendant had filed a timely rehabilitation appeal, and we held that because there was no other operative law, former section 4645 continues to govern the timeliness of appeals from decisions of the Rehabilitation Unit despite the fact that the section had been repealed:

> "[S]ection 4645 was itself repealed in 2003 (2003 ch. 635 [AB 227]), together with the rest of Division 4, Chapter 2, Article 2.6. Section 139.5 was also repealed and replaced by a new section that applies to injuries occurring on or after January 1, 2004. In 2004, former section 139.5 was re-enacted, with modifications, to apply to injuries occurring before January 1, 2004 (2004 ch. 34 [SB 899], §5). But the vocational rehabilitation sections of Article 2.6 were not re-enacted.
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> ...[T]he version of section 139.5(c) now operative refers to "former Section 4642" and "subdivision (d) or (e) of former Section 4644." Thus, even though these sections were repealed in 2003 and not reenacted in 2004, they still [must be deemed to exist] for injuries prior to January 1, 2004..." (69 Cal. Comp. Cases at 1313.)[6]

In the present case there is no operative law other than former section 4062 to provide a procedure for obtaining AME and QME medical-legal reports for cases involving represented

[6] In *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal. App. 4th 913, 916, fn. 2) [69 Cal. Comp. Cases 199, 200, fn. 2], the Court noted that "Section 4646 was repealed by the Legislature effective January 1, 2004. (Stats. 2003, ch. 635, § 14.3.) However, it continues to apply to injuries occurring prior to January 1, 2004. (§§ 139.5, subd. (d), 4658.5, subd. (d).)"

employees who sustained injuries prior to January 1, 2005. Therefore, we hold that for injuries occurring prior to January 1, 2005, section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees. Accordingly, defendant is entitled to its QME with Dr. Pfeffinger.[7]

For the foregoing reasons,

IT IS ORDERED, that it is the Appeals Board's Decision After Removal (En Banc) that the July 27, 2004 "Order Compelling Attendance at Defense QME and to Suspend Benefits" is **AFFIRMED**, except that the title of the Order is **AMENDED** to read "Order Compelling Attendance at Defense QME," and the statement that "an order may issue suspending the applicant's right to maintain any further proceedings and suspending the applicant's right to disability payments as of the date of the QME should applicant fail to attend" is **RESCINDED** and **STRICKEN**.

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[7] Contrary to applicant's objections, defendant is not required to return to Dr. Uro. Under former section 4062, subdivision (c), the parties are required to return to the same QME only "to the extent possible[.]" In this case, it is not possible for defendant to return to Dr. Uro because a specialist outside the field of podiatry is required to address the problems in the left knee. Therefore, *Alie v. American Home Assurance Co.* (2000) 28 Cal. Workers' Comp. Rptr. 17 is distinguishable. There the Appeals Board denied defendant a new QME in psychiatry after the WCJ rejected part of a prior defense psychiatric report obtained under section 4060. The Appeals Board reasoned that it was still "possible" to return to the original psychiatrist to address the WCJ's concerns. Here, a new QME with a different medical specialty is needed. Moreover, nothing in section 4060 requires defendant to return to Dr. Uro, and section 4067 does not apply because this case does not involve a petition to reopen.

IT IS FURTHER ORDERED, as the Appeals Board's Decision After Removal (En Banc), that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ as necessary or appropriate, including but not limited to consideration of Labor Code sections 4053 and 4054 and the distinctions between those two statutes, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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MERLE C. RABINE, Chairman

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WILLIAM K. O'BRIEN, Commissioner

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JAMES C. CUNEO, Commissioner

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JANICE J. MURRAY, Commissioner

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FRANK M. BRASS, Commissioner

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RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
2/1/05
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