

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

FERNANDO JAUREGUI, *Applicant*

vs.

**HAMSTRA DAIRY, permissibly self-insured,
administered by INTERCARE HOLDINGS INSURANCE SERVICES, INC., *Defendants***

**Adjudication Number: ADJ12570636
Fresno District Office**

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

Applicant seeks removal of the Order issued by the workers' compensation administrative law judge (WCJ) on September 21, 2021. By the Order, the WCJ struck the reports and deposition of the qualified medical evaluator (QME) pursuant to defendant's Petition to Strike Reporting of Panel Qualified Medical Examiner.

Applicant contends that defendant has not shown a basis to replace the QME per Administrative Director (AD) Rule 31.5(a) and therefore, the QME may not be replaced.

We received an "objection" to applicant's Petition from defendant, which we will treat as an answer. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of applicant's Petition for Removal, defendant'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, rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to his back and legs on April 17, 2017 while employed as a labor worker by Hamstra Dairy. Defendant has accepted injury to the back. (Petition to Strike Reporting of Panel Qualified Medical Examiner, August 26, 2021, p. 1.)

Timothy Butler, D.C. was selected as the chiropractic QME and evaluated applicant on September 16, 2019, issuing a report of the same date. (Petition to Strike Reporting of Panel Qualified Medical Examiner, August 26, 2021, p. 1.) Dr. Butler was also deposed by defendant on December 9, 2020. (*Id.* at p. 2.)

On August 26, 2021, defendant filed its Petition to Strike Reporting of Panel Qualified Medical Examiner. In the Petition, defendant argued that Dr. Butler was not an objective QME due to his “egregious billing practices as it relates to this case” and should be replaced. (Petition to Strike Reporting of Panel Qualified Medical Examiner, August 26, 2021, p. 2.)¹

On the same date as defendant’s Petition, the WCJ issued a Notice of Intention to Strike QME and QME Reports, and Order Restitution of QME Fees Received (NOI). Defendant was designated to serve the NOI. The record does not reflect an objection to the NOI by applicant.

Dr. Butler filed an objection to defendant’s Petition to Strike dated September 8, 2021.

The WCJ issued the disputed Order on September 21, 2021, which stated:

IT APPEARING THAT the only response to the NOI within the allotted time is from the QME, Dr. Butler whose objection is dated 09/08/2021, received 09/13/2021, and as the only “topic” the QME appears to address is the content of his deposition testimony, which as the court understands the issue, is not being disputed, but rather is the basis for the petition to strike, it does not appear further opinion from Dr. Baker [*sic*] is necessary.

GOOD CAUSE APPEARING;

IT IS ORDERED THAT Dr. Butler’s reports and deposition are struck from the record; the fees paid to Dr. Butler are ordered to be rescinded – OTHER than the deposition fee – with payment to be completed within 30 days; the parties shall request a replacement QME panel, or select an AME within 30 days.

It is from this Order that applicant seeks relief.

DISCUSSION

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board must be supported by

¹ Applicant in his Petition states that he filed an objection to defendant’s Petition to Strike on September 7, 2021. This objection does not appear to be contained in the Electronic Adjudication Management System (EAMS).

substantial evidence. (Lab. Code, §§ 5903, 5952(d);² *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) “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. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, at p. 475.)

The Order in this matter was issued without creation of an evidentiary record. We are unable to address whether the WCJ’s decision is supported by substantial evidence in the absence of a record.

Although we defer determination of the disputed issues to the trier of fact, we offer the following comments for further proceedings. AD Rule 31.5(a) enumerates 16 circumstances under which a party may request a replacement QME panel. (Cal. Code Regs., tit. 8, § 31.5(a).) Alternatively, a new panel may be obtained when a party engages in ex parte communication with the QME and the aggrieved party elects to terminate the evaluation pursuant to section 4062.3(g). (Lab. Code, § 4062.3(g); *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1814-1815 (Appeals Board en banc).)

Defendant’s Petition to Strike alleges that Dr. Butler is not objective because his billing for the 2019 report was purportedly excessive. Defendant cites no legal authority for why a dispute regarding a QME’s billing permits for a replacement QME panel. This is not one of the enumerated reasons for a replacement panel per AD Rule 31.5(a). There is no contention by defendant that applicant engaged in ex parte communication with the QME.³

In conclusion, we will grant applicant’s Petition, rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion.

² All further statutory references are to the Labor Code unless otherwise stated.

³ It is noted moreover that defendant’s Petition to Strike was filed in August 2021, nearly two years after Dr. Butler’s 2019 report and related billing, and several months after his 2020 deposition. Generally, a party is expected to lodge an objection to a QME at the first opportunity upon learning grounds for the objection. (*Suon, supra*, 83 Cal.Comp.Cases at p. 1812; see also *Fajardo v. Workers’ Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1158 (writ den.) [a party cannot wait until after receipt of an untimely report to make an objection based on timeliness and request a replacement QME panel].)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the Order issued by the WCJ on September 21, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Order issued by the WCJ on September 21, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

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

December 23, 2021

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

**FERNANDO JAUREGUI
GROSSMAN LAW
YRULEGUI & ROBERTS**

AI/pc

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