

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

**MARTHA ROMERO, *Applicant***

**vs.**

**IHSS STATE OF CALIFORNIA, legally uninsured, *Defendants***

**Adjudication Number: ADJ8725567  
Van Nuys District Office**

**OPINION AND ORDERS  
DISMISSING PETITION FOR  
RECONSIDERATION,  
GRANTING PETITION  
FOR REMOVAL  
AND DECISION  
AFTER REMOVAL**

Applicant seeks reconsideration of the Findings of Fact and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 19, 2021.<sup>1</sup> By the F&O, the WCJ denied applicant's request for a third qualified medical evaluator (QME) panel in orthopedics and for an additional panel in neurology. It was further ordered that the orthopedic QME provide his opinion as to any period of temporary disability.

Applicant contends that the evidence supports her claim for temporary disability indemnity. She also contends that it was error to deny her requests for a replacement QME panel in orthopedics and for an additional QME panel in neurology.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of applicant's Petition for Reconsideration, 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 dismiss the Petition to the extent it seeks reconsideration. We will grant the Petition to the extent it seeks removal to amend the F&O to find that there is good cause for an additional QME panel in neurology and add an order for this panel. The F&O will otherwise be affirmed.

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<sup>1</sup> The F&O is dated January 18, 2021, but was not served until January 19, 2021.

## FACTUAL BACKGROUND

This matter initially went to trial on several issues in 2016. On November 22, 2016, the previous WCJ issued a Findings and Order that included a finding of injury arising out of and in the course of employment (AOE/COE) to the knees, shoulders, neck, trunk, ankles and low back from cumulative trauma through May 17, 2012 while employed as a caregiver by In-Home Supportive Services. The WCJ found that applicant failed to sustain her burden of proving injury AOE/COE to the head, arms, wrists, upper extremities, hands, lower extremities, feet, psyche, hypertension, sleep or gastritis. Applicant sought reconsideration of the 2016 decision, which was denied.

Applicant subsequently amended her application in April 2018 to include injury AOE/COE in the form of a stroke.

Mitchell Silverman, M.D. was originally the orthopedic QME. He was replaced by Hrair Darakjian, M.D. in 2018.

The matter proceeded to trial on September 24, 2020 on several issues including temporary disability with applicant claiming 104 weeks commencing March 24, 2012, applicant's request for a replacement QME panel in orthopedics and applicant's request for an additional panel in neurology. (Minutes of Hearing, September 24, 2020, pp. 2-3.)

The WCJ issued the F&O as outlined above.

## DISCUSSION

### I.

Labor Code<sup>2</sup> section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice...." (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

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<sup>2</sup> All further statutory references are to the Labor Code unless otherwise stated.

Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Applicant’s Petition was timely filed on February 8, 2021. Our failure to act was due to a procedural error and our time to act on applicant’s Petition was tolled.

## II.

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Id.* at p. 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ’s decision solely resolves intermediate procedural or evidentiary issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. With respect to applicant’s contentions regarding the issue of temporary disability, this issue was not determined in the F&O, but was deferred pending development of the record from the orthopedic QME. Accordingly, the F&O is not a “final” decision and the Petition will be dismissed to the extent it seeks reconsideration.

## III.

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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); *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].)

Applicant takes issue with the WCJ's denial of her request for a replacement QME panel in orthopedics. Applicant has not shown that she will suffer significant prejudice or irreparable harm, or that reconsideration of a final decision will not be an adequate remedy if the WCJ's order denying her request for a replacement orthopedic QME panel remains intact.

However, with regard to applicant's request for another QME panel in neurology, we will grant removal and amend the F&O to provide for another panel in neurology.

The WCJ concluded that a neurological panel is not warranted because applicant's hypertension was previously found unrelated to her industrial injury in the 2016 Findings and Order. The WCJ's conclusion assumes that applicant's stroke was related to her hypertension and not to her industrial injury. The cause of applicant's stroke is a medical determination, which must be evaluated by a medical expert. (See e.g., *Peter Kiewit Sons v. Industrial Acci. Com. (McLaughlin)* (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188] [the "medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge".])

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.)

The parties cannot return to the orthopedic QME to address the issue of causation for applicant's stroke. We therefore agree with applicant that an additional QME panel in neurology is necessary to evaluate causation for her stroke. (See also *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].)

Therefore, we will dismiss applicant's Petition to the extent it seeks reconsideration and grant the Petition solely to amend the F&O to find that there is good cause for an additional QME panel in neurology and add an order for this panel.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings of Fact and Orders issued by the WCJ on January 19, 2021 is **DISMISSED**.

**IT IS FURTHER ORDERED** applicant's Petition for Removal of the Findings of Fact and Orders issued by the WCJ on January 19, 2021 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board that the Findings of Fact and Orders issued by the WCJ on January 19, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

\* \* \*

**MOTION FOR A NEUROLOGIC PANEL**

There is good cause to grant applicant's request for another QME panel in neurology.

\* \* \*

**FURTHER ORDERS**

Applicant's request for an additional QME panel in neurology is granted.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

I CONCUR,

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ DEIDRA E. LOWE, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MAY 20, 2021**

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

**LAW OFFICES OF FELIX MCNULTY  
MARTHA ROMERO  
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