WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

THOMAS GALLEGOS, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION-CALIFORNIA HEALTH CARE FACILITY STATE OF CALIFORNIA, legally uninsured and administered by STATE COMPENSATION INSURANCE FUND
Defendants

Adjudication Numbers: ADJ15539216, ADJ15538700
Lodi District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Applicant seeks reconsideration of the "Findings and Orders" (F&O) issued on June 30, 2025. The workers' compensation administrative law judge (WCJ) found, in relevant part, that an additional panel in the specialty of spine (MNB) is appropriate to address alleged injury to the back and neck.

Applicant argues that the additional panel will cause unnecessary delay in the adjudication of applicant's two cases and that the qualified medical evaluator (QME) designated for a separate case has already commented on the back and neck. Applicant argues that the separate QME's report was obtained to comment on the additional body parts, is admissible, and is therefore sufficient to address the issue.

Defendant filed an Answer. The WCJ issued a Report and Recommendation (Report), recommending denial of the Petition both on the merits and because the Petition should have been filed as a Petition for Removal.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record and as discussed below, we will dismiss the Petition

as one for reconsideration and treat it as one for removal, grant the Petition for Removal, rescind the decision and return the matter to the trial level for further proceedings consistent with this opinion.

FACTS

On December 8, 2021, applicant filed two applications. The case at issue here, ADJ15539216, alleges a cumulative trauma injury from December 15, 2019 through December 15, 2020 to the upper extremity and wrist while employed as a correctional supervising cook. The accompanying claim form dated September 23, 2021 alleges cumulative trauma to the right upper extremity and right wrist. (Joint 109). The other application, assigned ADJ15538700, alleges a specific injury of January 1, 2018 to the upper extremity and wrist due to "opening metal food carts" while employed as a correctional supervising cook. The claim form dated November 13, 2021 alleges right hand and right wrist. (Joint 108).

On December 16, 2021, defendant obtained a panel in the specialty of "hand." (Joint 106). Michael Moore, M.D., was selected as the panel QME. On January 3, 2022, applicant obtained a panel in the specialty of physical medicine and rehabilitation without objection from defendant. (Joint 107). Nader Achackzad, M.D., was selected from this panel.

Dr. Moore evaluated applicant on February 8, 2022, issuing a report dated the same. (Joint 102). He found cumulative injury to the right wrist, right hand, and right thumb. (*Id.* at p. 20). He diagnosed injuries in the left hand and bilateral shoulders, but opined that they were unrelated to the cumulative injury through December 15, 2020. Dr. Moore issued a supplemental report on March 2, 2022 in which he reviews another treatment report, but does not change any opinions. (Joint 103).

Dr. Achackzad did not evaluate applicant until May 13, 2024 and issues a report dated June 13, 2024. (Joint 104). He found that applicant sustained a cumulative injury to his right upper extremity, left shoulder, and left hand through December 15, 2020. (*Id.* at p. 21). He provided impairment ratings for the cervical spine, right shoulder, right wrist, left shoulder, and left wrist. (*Id.* at p. 21-23).

On June 17, 2024, applicant amended both applications to include bilateral shoulders, spine, neck, and left upper extremity.

Subsequently, Dr. Achackzad issued a supplemental report dated July 19, 2024 commenting on impairment. (Joint 105).

Dr. Moore evaluated applicant again on December 10, 2024 and issued a report. (Joint 100). Dr. Moore addressed the newly added body parts but concluded that only the right hand, fingers, and right wrist were industrially related while deferring an opinion on psyche and spine to another specialty as they are outside his expertise. (*Id.* at p. 15). He issued a supplemental report dated January 3, 2025 in which medical records were reviewed and impairment was outlined for the right wrist, hand, and fingers. (Joint 101).

Only ADJ15539216 was submitted at trial on April 16, 2025. (Minutes of Hearing (MOH), April 29, 2025). The issues were as follows:

> 1. Defendant requests an order for additional panel and spine (MNB) to address recently pleaded body parts of neck and back.
> 2. Defendant submits Dr. Achackzad is not the QME for either claim, per Labor Code Section 4062.3.
> 3. Applicant contends that Dr. Achackzad should be the QME for the other orthopedic complaints, which include neck, spine, et al.

(MOH, 2:14-18)

The WCJ issued an F&O which included the following Findings of Fact:

> 1. Dr. Michael Moore, M. D., is the QME in ADJ15539216. CT- 12-15-20
> 2. Dr. Nader Achackzad, M.D., is the QME in ADJ15538700, Specific 1-1-18.
> 3. A new panel to address back and neck MNB is appropriate.

DISCUSSION

I

Former Labor Code section 5909[1] provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (2) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 4, 2025 and 60 days from the date of transmission is October 3, 2025. This decision is issued by or on October 3, 2025 so that we have timely acted on the petition as required by section 5909(a).

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 4, 2025 and the case was transmitted to the Appeals Board on August 4, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 4, 2025.

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.

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 substantial 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).).

In this matter, the findings were interlocutory procedural findings, and none addressed a threshold issue. The findings did not determine any substantive right or liability and does not determine a threshold issue. To the extent that there may be findings in the opinion section, they are not enforceable. Reconsideration is therefore inappropriate here. Accordingly, it is not a "final" decision, and the Petition will be dismissed to the extent it seeks reconsideration, and we will review the Petition as one for removal.

III

We turn now to the merits. At the outset, we clarify Dr. Moore should have been the proper QME for both cases as both claim forms were dated prior to Dr. Moore's initial evaluation on February 8, 2022. Pursuant to *Navarro v. City of Montebello*, (2014) 79 Cal.Comp.Cases 418, sections 4062.3(j) and 4064(a) taken together state that a medical evaluation shall address "all medical issues arising from all injuries reported on one or more claim forms." (*Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Board en banc).) In keeping with the requirements set forth in sections 4062.3(j) and 4064(a), *Navarro* clarifies that at the time of an evaluation, the evaluator shall consider all issues arising out of any claims reported before the evaluation, and if several subsequent claims of injury are filed before the evaluation takes place, the evaluator shall also consider those claims. (*Id.* at p. 425).

Under *Navarro*, the date the claim form is filed is the operative act in determining the right to request a new QME panel. If a claim form for an additional injury is filed before the evaluation with the panel QME, then that QME shall remain as the QME for all injuries with submitted claim

forms. Here both claims forms pre-date the evaluations, as such Dr. Moore would be the QME for both claims. When the claims were amended to include additional disputed body parts, Dr. Moore would likewise remain the QME for both claims.

However, defendant waived the right to object to Dr. Achackzad evaluating applicant as a QME when they failed to object to the initial panel request made January 3, 2022, the setting of the initial evaluation on May 13, 2024, the report from the initial evaluation dated June 13, 2024, or the supplemental report July 19, 2024. Waiver is the intentional relinquishment of a known right after knowledge of the facts, and it may be either express or implied. (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) (*Supervalu*) 74 Cal.Comp.Cases 720, 728.) "To make a case of abandonment or waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part." (*First Nat'l Bank v. Maxwell* (1899) 123 Cal. 360, 367-368.) Here, the second panel request was clearly made after the first panel was obtained. The principles outlined in *Navarro*, *supra*, decided twelve years prior, clearly provide that one panel QME shall opine on all claims filed at the time of the evaluation. As such, when defendant did not object at any point to an evaluation going forward with Dr. Ackachzad their actions or lack of action constitute waiver of the right to object. Further, Dr. Ackachzad performed the evaluation and applicant attended in good faith, and therefore defendant is estopped to now argue that the evaluation is not an appropriate medical legal evaluation pursuant to sections 4060 and 4062.2.

Due to the clear waiver by defendant, we will keep the findings intact. However, we do seek to make clear that the principles in *Navarro* would have otherwise required a finding that Dr. Moore was the sole QME for both claims as the panel was obtained first and Dr. Moore evaluated and commented on all claims existing at the time of the evaluation.

IV

If the QME cannot opine on a dispute or body parts there are procedures by which the parties may seek another opinion to resolve the dispute. We agree that use of Dr. Achackzad for this purpose is not appropriate here. However, we disagree the record is complete for a determination that good cause is shown an additional panel in a different specialty is appropriate here.

WCAB Rule 31.7 provides the specific procedure by which an additional panel in a different specialty may be obtained. (Cal. Code Regs., tit. 8, §31.7). WCAB Rule 31.7 provides 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.
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> (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:
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> (1) A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or
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> (2) Where an acupuncturist has referred the parties to the Medical Unit to receive an additional panel because disability is in dispute in the matter; or
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> (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)

In this matter, there was not a finding that good cause for an additional panel in a different specialty is warranted. While the panel from which Dr. Moore was selected was in the specialty of "hand," the specialty is under the larger umbrella of orthopedic surgery. The request for an additional panel in "spine" is likewise in a specialty also potentially under the larger umbrella of orthopedic surgery. We are not convinced that there is enough of a difference to warrant another panel in a *different* specialty. In these circumstances the result would be an additional panel for each and every body part that an orthopedist should be able to comment on, but opines for the need for a consultation by a specialist.

Upon return to the trial level, consideration should be made for whether Dr. Moore should be replaced or whether a replacement panel in a different specialty that can opine on all disputed orthopedic body parts should issue pursuant to WCAB rule 31.5. (Cal. Code Regs., tit. 8, §31.5.) The party first requesting a QME panel has the legal right to designate the panel specialty pursuant to section 4062.2(b). (See also Cal. Code Regs., tit. 8, § 30.5 ["Medical Director shall utilize in the

QME panel selection process the type of specialist(s) indicated by the requestor"].) In this case that party was defendant. The opposing party may submit a written request for a replacement QME panel in another specialty to the Medical Director on the basis that the chosen specialty "is medically or otherwise inappropriate for the disputed medical issue(s)" pursuant to AD Rule 31.5(a)(10). (Cal. Code Regs., tit. 8, § 31.5(a)(10).) Either party may appeal the Medical Director's decision regarding the appropriateness of the panel specialty to a WCJ as provided in AD Rule 31.1(b). (Cal. Code Regs., tit. 8, § 31.1(b).) Applicant has not made this showing. However, here it is plausible that another hand specialist would be able to comment on all orthopedic complaints and pursuant to 31.5 replacing the panel in the same specialty may be appropriate. We make no determination here that replacing the panel either in the same specialty or in a different specialty is appropriate, but consideration should be made to determine the best means of obtaining substantial medical evidence and a clear record.

Last, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence to determine causation of a disputed body part. (See Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra,* 67 Cal.Comp.Cases at 141.) Here there seems to be no dispute that Dr. Moore's medical opinions are incomplete as to the spine.

Although the preferred procedure to develop a deficient medical record per *McDuffie* is to return to the existing physicians who have already reported in the case, where the QME defers to a specialist for a disputed body part, there is a need for additional development of the record. Per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, the WCJ can then appoint a physician to evaluate applicant's injury pursuant to section 5701. In this case, if the parties cannot agree to an AME, a consultation pursuant

to section 5701 is an option to supplement deficiencies in Dr. Moore's reporting.

Applicant contends that they intended that the second panel procured using a separate claim number through the online portal to act as the panel QME for the orthopedic complaints to the spine. However, Dr. Achackzad was never intended to be an additional panel QME in the case at bar. To allow Dr. Achackzad to become a de facto additional QME in the case at bar where there was not an agreement of all the parties would undermine the abundance of appropriate procedures outlined above.

Upon return to the trial level, we urge the parties to consider discussing the utilization of an AME either for the claim in whole or for the additional disputed body parts. Short of an agreement, a determination must be made as to the basis for bringing in another physician in this claim, whether in a consultive fashion, as a replacement, or as an additional panel in a different specialty.

Accordingly, we dismiss the Petition as one for reconsideration, grant it as one for removal, rescind the decision and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of July 21, 2025 is **RESCINDED** and **RETURNED** for further development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 3, 2025

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

THOMAS GALLEGOS
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC
STATE COMPENSATION INSURANCE FUND

TF/ md

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