WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

AMARJEET GILL, *Applicant*

vs.

COUNTY OF FRESNO; permissibly self-insured, administered by AIMS, *Defendants*

Adjudication Numbers: ADJ12918124, ADJ12918126, ADJ12949334
Fresno District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal of the Findings of Fact, Order and Opinion on Decision (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 21, 2020.[1] By the F&O, the WCJ found that applicant's letter to defendant was not legally sufficient to trigger the ten-day period in which to request a qualified medical evaluator (QME) panel from the Medical Unit. The WCJ also found that there was insufficient evidence to adjudicate whether panel number 2533182 or panel number 7328637 is the appropriate panel in which to set the QME evaluation. The parties were ordered to identify additional evidence regarding how panel number 2533182 was requested, whether defendant's objection letter was barred by estoppel and which panel is the appropriate panel for the evaluation.

Applicant contends that her initial panel request was properly made and the evaluation should proceed with panel number 2533182 which was obtained as a replacement of her initial panel.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we dismiss the Petition or deny removal.

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[1] The WCJ designated defendant's attorney to serve the F&O and cited the Appeals Board's March 18, 2020 In Re: COVID-19 State of Emergency En Banc (Misc. No. 260) for emailing the F&O only to defendant's attorney and designating service. In the en banc decision, the Appeals Board suspended WCAB Rule 10628, which requires service by the WCAB by mail unless a party has designated email for service. (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020).) The decision stated that service by the WCAB may be made electronically with or without parties' consent, but did not state that the WCAB may designate a party to serve a final decision, order or award. The district offices should still serve all parties of record with a final decision, order or award (whether electronically or otherwise), not designate a party to serve.

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 as one seeking reconsideration, rescind the F&O and issue a new decision finding that applicant's initial panel request was properly made. We will also find that panel number 7328637 obtained by defendant was invalid. The parties will be ordered to utilize panel number 2533182 for ADJ12918126 and ADJ12949334. Applicant's request for attorney's fees will be ordered denied.

FACTUAL BACKGROUND

Applicant has filed three claims for injury while employed as a district attorney investigator by the County of Fresno: to the left shoulder on December 2, 2019 (ADJ12918124); to the neck, low back, shoulders, wrists, hands, diabetes, alopecia and hiatal hernia through December 18, 2019 (ADJ12918126); and to the bilateral wrists and bilateral hands through January 23, 2020 (ADJ12949334).

On January 22, 2020, applicant filed a DWC-1 claim form with defendant for the cumulative trauma claim through December 18, 2019 (ADJ12918126). (Applicant's Exhibit No. 1, Applicant attorney letter to employer and TPA with DWC-1 claim form, January 22, 2020.) The parties have stipulated that the employer received the claim form via facsimile on that date. (Minutes of Hearing; Order of Consolidation, October 6, 2020, p. 4.)

The following day, January 23, 2020, applicant sent defendant a letter stating:

> A Medical-Legal evaluation is necessary to determine compensability of the above captioned claim and is hereby demanded pursuant to Labor Code sections 4060 and 4062. I offer Mark Hyman, MD, as internal medicine AME and either Theodore Georgis, MD, or Brian Rothi, MD, as orthopedic surgery AME. The offer to use these physicians as AME will expire in 15 days.
>
> (Joint Exhibit No. 101, Applicant attorney letter to AIMS, January 23, 2020.)

On January 30, 2020, defendant sent applicant a Notice Regarding Denial of Workers' Compensation Benefits denying the 2019 cumulative trauma claim in its entirety (ADJ12918126). (Joint Exhibit No. 102, AIMS denial of workers' compensation benefit, January 30, 2020.)[2]

[2] This exhibit was identified in part of the Minutes of Hearing as in relation to ADJ12918124, which is the specific injury claim. However, the record reflects that the specific injury claim has been accepted by defendant and this denial letter was actually issued with respect to the 2019 cumulative trauma claim (ADJ12918126). (Minutes of Hearing;

Applicant requested a QME panel in pain medicine for the 2019 cumulative trauma claim (ADJ12918126) on February 7, 2020 and panel number 7313771 issued on February 10, 2020 per her request. (Defendant's Exhibit C, Applicant attorney's panel request documentation, February 7, 2020; Defendant's Exhibit D, Panel List No. 7313771, February 7, 2020.) The panel request identified the dispute type as a compensability dispute citing Labor Code section 4060. (Lab. Code, § 4060.)[3] Applicant utilized her January 23, 2020 letter to defendant as the document triggering the panel process and served the panel on defendant with her strike of Dr. Joseph Sclafani on February 7, 2020. (Defendant's Exhibit C, Applicant attorney's panel request documentation, February 7, 2020.)

On February 14, 2020, defendant sent a letter to applicant stating:

> Defendant is in receipt of the attached QME panel, number: 7313771. From this panel, defendant strikes Dr. Paul (Gurpal) Sandhu.
>
> It is my understanding that Dr. Fujimoto is no longer doing panel QME evaluations at the Salinas address. Therefore you will need to request a replacement panel.
>
> (Defendant's Exhibit E, Defendant's Strike Letter for Panel No. 7313771.)

Applicant responded to defendant by letter dated February 17, 2020 stating in pertinent part:

> Dr. Fujimoto is no longer scheduling PQME evaluations at the address listed on the Panel. I would agree to schedule with Dr. Fujimoto at one of his other locations and stipulate that Dr. Fujimoto maintains the status of a PQME or I would agree to Theodore Georgis, MD, as Ortho AME. Because I like to discourage Defendants from waiting to see if they get a favorable panel, this offer will be revoked once a replacement panel from the Medical Unit is received.
>
> (Applicant's Exhibit No. 9, Applicant attorney's meet and confer letter with QME form 31.5, February 17, 2020, p. 1.)

Attached to applicant's letter was a QME replacement request form that showed service of the request on the Medical Unit as well. (*Id.* at pp. 2-3.)

The Medical Unit issued replacement panel number 2533182 on March 6, 2020 in response

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Order of Consolidation, October 6, 2020, pp. 3, 6 and 8; Applicant's Petition for Removal, December 23, 2020, p. 4; Defendant's Answer to Petition for Removal, January 7, 2021, p. 2.)

[3] All further statutory references are to the Labor Code unless otherwise stated.

to applicant's request. (Applicant's Exhibit No. 10, Applicant attorney's strike from replacement Panel No. 2533182, p. 2.) Applicant struck Wayne Anderson, D.O. from the panel on March 12, 2020. (*Id.* at p. 1.)

Defendant sent a letter dated March 16, 2020 to applicant conditionally striking Dr. Behzad Emad from panel number 2533182 and advising of its intent to ask the Medical Unit to address this panel. (Joint Exhibit No. 103, Defense strike of panel 2533182, March 16, 2020.) Eduardo Lin, M.D. was the last remaining physician on the panel following defendant's strike.

On April 7, 2020, defendant sent a letter to the Medical Unit asking that it invalidate the panel list requested by applicant. (Defendant's Exhibit H, Letter to Medical Unit, April 7, 2020.) The letter stated in relevant part:

> Applicant's request for a panel QME list to address compensability under Labor Code section 4060 was premised on the enclosed letter to defendant dated January 23, 2020.
>
> It is defendant's position that this letter, generated by applicant's counsel, does not constitute a valid basis for a panel QME request. "A request for a medical evaluation pursuant to Section 4060" as set forth in Labor code section 4062.2 refers to the notice in Section 4060(d) whereby the employer notifies the employee either that the employer requests a comprehensive medical evaluation to determine compensability or that the employer has not accepted liability and the employee may request a comprehensive medical evaluation to determine compensability.
>
> The form for requesting a QME panel must accompany the notice per subsection (e). Also, when a claim is denied the employer must provide the DWC pamphlet "QME/AME Fact Sheet" explaining how to request a QME evaluation. 8 Cal. Code Reg. §9812(i). Defendant is unaware of any authority that recognizes a letter submitted by applicant's counsel as a valid means of initiating the panel QME process for purposes of section 4060.
>
> Based on this, defendant requests that the panel list No. 2533182 be invalidated and that the parties be allowed to proceed anew based upon the date of the delay or denial notices issued by defendant.
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> (*Id.* at pp. 1-2.)

Defendant submitted a request for a QME panel for the 2020 cumulative trauma claim (ADJ12949334) on April 15, 2020 and the Medical Unit issued panel number 7328637 in orthopedic surgery the following day. (Joint Exhibit No. 104, Defense attorney's service of Panel No. 7328637 with QME 106 and supporting documents, April 16, 2020.) The panel request

identified the dispute type as a compensability dispute citing section 4060. Attached to the request was a March 31, 2020 Notice Regarding Denial of Workers' Compensation Benefits denying the 2020 cumulative trauma claim "on the grounds that it appears to be a duplication of injuries already filed on a previous claim for a workers' compensation injury." (*Id.* at p. 5.)

On April 17, 2020, applicant filed a Petition for Order Revoking Panel No. 7328637 and Petition for CCR 10421 Remedies. (Applicant's Exhibit No. 14, Applicant attorney's request for revocation of Panel No. 7328637, April 17, 2020.) On the same date, applicant sent a letter to the Medical Unit requesting that defendant's panel be revoked. (Applicant's Exhibit No. 17, Medical Unit response to applicant attorney's request to revoke panel no. 7328637, May 6, 2020, p. 2-3 [attached April 17, 2020 letter].) Applicant argued that the panel request was invalid because the March 31, 2020 Notice Regarding Denial of Workers' Compensation Benefits was not a request for a medical evaluation, or in the alternative, the request was invalid because a physician from applicant's pain medicine panel for ADJ12918126 should address the contested issues from all injuries reported on one or more claims forms prior to the initial appointment. (*Id.*)

The Medical Unit responded to applicant by letter dated May 6, 2020, stating:

> We are in receipt of your letter dated 4/17/20 objecting to panel #7313771.
>
> The issue(s) you have raised are outside the Medical Unit's jurisdiction. The issue(s) must be resolved by a Workers' Compensation Administrative Law Judge.
>
> Therefore, the Medical Unit will take no further action at this time.
>
> (*Id.* at p. 1.)[4]

The matter proceeded to trial on October 6, 2020. Applicant's three claims were ordered consolidated. (Minutes of Hearing; Order of Consolidation, October 6, 2020, p. 2.) Several issues were identified as in dispute:

> 1. Whether applicant attorney's 1/23/2020 request for a medical evaluation is legally sufficient pursuant to Labor Code sections 4062.2, 5401 and 4060 to trigger the 10-day time frame to request a panel.
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> 2. If the applicant attorney's 1/23/2020 request was not sufficient, whether Panel No. 2533182 should be stricken.

[4] It is noted that the Medical Unit inadvertently referred to panel number 7313771, which was the original QME panel obtained by applicant, not the number of the panel obtained by defendant.

3. Whether defendant's 3/16/2020 objection to Panel No. 2533182 is barred by estoppel.

4. Whether defendant's use of the 3/31/2020 denial notice to the 1/23/2020 date of injury, as a premise of its 4/15/2020 panel request, was proper pursuant to Labor Code sections 4062.2 and 4060.

5. If defendant's 3/31/2020 denial was not proper, whether Panel No. 7328637 should be stricken.

6. Whether defendant's 4/15/2020 panel request should be barred pursuant to Labor Code sections 4062.3 and 4064.

7. If defendant's 4/15/2020 panel request is barred, whether Panel No. 7328637 should be stricken.

8. Whether defendant acted in bad faith by submitting its 4/15/2020 panel request.

9. If defendant acted in bad faith, whether CCR 10421 remedies are appropriate pursuant to the applicant attorney's 4/17/2020 Petition for Order Revoking Panel No. 7328637 and Petition for CCR 10421 Remedies.

10. Whether Panel No. 2533182 or Panel No. 7328637 is the appropriate panel in which to set applicant's QME evaluation.

(*Id.* at pp. 5-6.)

The WCJ issued the F&O as outlined above. The F&O included a finding that applicant sustained an injury arising out of and in the course of employment (AOE/COE) to the left shoulder on December 2, 2019 (ADJ12918124) pursuant to the parties' stipulations at trial.[5]

DISCUSSION

I.

Applicant sought removal of the F&O. 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 AOE/COE, jurisdiction, the existence of an employment

[5] This finding will be retained in the new decision.

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.

The F&O included a finding that applicant sustained injury AOE/COE to her left shoulder in ADJ12918124. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

II.

Although the F&O contains a finding that is final, applicant only challenges the WCJ's finding that applicant's January 23, 2020 letter to defendant was not legally sufficient to trigger the ten-day period in which to request a panel and the findings regarding the validity of defendant's QME panel. These are interlocutory decisions and are subject to the removal standard rather than reconsideration pursuant to the discussion above. (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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Section 4060 provides as follows in relevant part:

> (a) This section shall apply to disputes over the compensability of any injury. This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.
> …
> (c) If a medical evaluation is required to determine compensability **at any time after the filing of the claim form**, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.
>
> (Lab. Code, § 4060(a) and (c), emphasis added.)

To obtain a QME panel in a represented case, section 4062.2 provides, in relevant part, as follows:

> (a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
>
> (b) No earlier than the first working day that is **at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060** or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, **either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation**. The party submitting the request shall designate the specialty of the medical evaluator, the specialty of the medical evaluator requested by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. The party submitting the request form shall serve a copy of the request form on the other party.
>
> (Lab. Code, § 4062.2(a)-(b), emphasis added.)

Section 4060 permits a medical-legal evaluation to determine compensability "at any time after the filing of the claim form." Section 4062.2(b) requires the party requesting a medical evaluation pursuant to section 4060 to wait until the first working day that is "at least 10 days after the date of mailing of a request for a medical evaluation." Accounting for an additional five days for mailing within California pursuant to WCAB Rule 10605(a)(1), the requesting party may consequently request a panel on the 15th day from the mailing date of a request for an evaluation. (See *Murray v. County of Monterey* (May 29, 2015, ADJ9541181) [2015 Cal. Wrk. Comp. P.D. LEXIS 304] [panel found that the existing version of section 4062.2 allows a QME panel request on the 10th day after a written objection (or 15th day if the request is mailed), unlike in *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc), which required waiting

until the 16th day per a previous version of the statute];[6] Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).)

Applicant sent defendant a letter requesting a medical evaluation on January 23, 2020 and waited ten days plus five days for mailing (within California) before requesting a QME panel from the Medical Unit on February 7, 2020. She therefore properly obtained a QME panel per sections 4060 and 4062.2.

Defendant contends that there must be a dispute regarding whether the claim is compensable before applicant may initiate the QME panel process and there was no dispute at the time of applicant's January 23, 2020 letter because the claim had not been denied yet. This contention conflicts with the express language of the applicable statutes and the legislative intent behind changes to the QME panel process, as well as previous panel decisions interpreting what may trigger the panel process. In *Bahena v. Charles Virzi Construction* (December 17, 2014, ADJ8417754) [2014 Cal. Wrk. Comp. P.D. LEXIS 638], the WCJ noted the following relevant legislative history:

> [Senate Bill] 863 was introduced on February 18, 2011, and was amended on August 24, 2012 to include the changes to Sections 4060 and 4062.2(b). The analysis accompanying that amended version states,
>
> > ". . . Existing law establishes procedures for the resolution of disputes regarding the compensability of an injury. . . Existing law prescribes a specific procedure that governs dispute resolution relating to injuries occurring on or after January 1, 2005, when the employee is represented by an attorney. This procedure includes various requirements relating to the selection of agreed medical evaluators. . . This bill would revise and recast these provisions."
>
> SB 863 was passed by the Senate and the Assembly on August 31, 2012. The bill analysis of the Senate Rules Committee, dated August 30, 2012, states that this bill, "streamlines the AME and QME process to eliminate unnecessary delays and friction in the system."
>
> (*Id.* at p. *12.)

[6] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

Pursuant to this history, the WCJ in *Bahena* found that that applicant's QME panel request was validly made ten days from the date of defendant's denial notice without sending a second letter notifying defendant of his intent to request a QME panel. The WCJ concluded that "[e]liminating the requirement that a party requesting a QME panel propose an AME first, but retaining the requirement that a letter must still be sent and an additional 10-day waiting period must pass before a panel can be requested, does nothing to streamline the current process and eliminate unnecessary delays." (*Id.* at p. *13.)

Similarly in *Chavarria v. Crews of California, Inc.* (December 2, 2019, ADJ12402022) [2019 Cal. Wrk. Comp. P.D. LEXIS 534], the Appeals Board held that a party may request a QME panel per sections 4060 and 4062.2(b) by using a claim delay notice as a "mailing of a request for a medical evaluation." In *Chavarria*, the panel concluded that "[b]oth parties have the right to perform discovery regarding the causation of applicant's injury while an employer determines whether to accept a claimed injury." (*Id.* at p. *8.)

The approach endorsed by defendant in this matter would mean that a party could be required to wait until the employer has denied the claim within the 90-day investigation period before a "dispute" under section 4060 may be asserted. (Lab. Code, § 5402 [an injury is presumed compensable if liability is not rejected within 90 days after the date the claim form is filed].) As noted in *Chavarria*, "section 4060 does not require the denial of a claim before a represented applicant can request a panel of QMEs to address the compensability of an injury." (*Chavarria*, *supra*, at p. *8.) The stated purpose of amending sections 4060 and 4062.2 by SB 863 was to streamline the QME panel process to eliminate unnecessary delays. Requiring a party to potentially wait 90 days after the claim form has been filed for an employer to deny the claim (thereby unequivocally asserting a "dispute" regarding compensability) before requesting a panel creates unnecessary delay and hinders expeditious resolution of the claim.

Likewise, requiring a party to await mailing of a notice of delay in determining liability for an injury to trigger the QME panel process also creates unnecessary delay. (See Cal. Code Regs., tit. 8, § 9812(g) [the claims administrator must advise the employee if the administrator cannot determine whether the employer has any liability for an injury within 14 days after the date of knowledge of an injury].) Requiring a claim delay notice to trigger the QME panel process would necessitate waiting potentially the entire 14-day delay notice period, then an additional ten days plus the mailbox extension before a party could request a QME panel. This approach conflicts with the broad language of section 4060(c) permitting a request for a panel "**at any time after the**

filing of the claim form." We decline to impose requirements on the process for requesting a QME panel not reflected in the Labor Code and that would inhibit the expeditious resolution of a claim.

Additionally, although amendments were made to the QME panel process by SB 863 effective January 1, 2013, the language of section 4060(c) remains the same as it was at the time of the Appeals Board's 2010 en banc decision, *Mendoza v. Huntington Hospital* (2010) 75 Cal.Comp.Cases 634 (Appeals Board en banc). The *Mendoza* decision found that sections 4060 and 4062.2 when read together establish that either party may request a QME panel at any time. (*Id.* at p. 642.) The decision observed that "section 4060(c) specifically provides that the section 4062.2 procedure for medical evaluations on compensability may be undertaken 'at any time' after a claim form has been filed." (*Id.*) This analysis of sections 4060 and 4062.2 in the *Mendoza* decision remains accurate for the current versions of these statutes.

A "dispute" regarding compensability of an injury per section 4060 is not synonymous with a "contested claim" per section 4620(b). (Lab. Code, § 4620(b).)[7] Section 4620 provides for medical-legal expenses when they are incurred "for the purpose of proving or disproving a contested claim." (Lab. Code, § 4620(a).) Although the cost of a QME evaluation or report may constitute a medical-legal expense if it is capable of proving or disproving a disputed medical fact per section 4620(c), there is nothing in the Labor Code that suggests the definition of contested claim in section 4620(b) is the same as a "dispute" per section 4060. (Lab. Code, § 4620(c).) These statutes are in different statutory chapters, address different issues and use different wording. (See *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286] [the words of a statute "must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear"].) We discern no basis to adopt the definition of

[7] Section 4620(b) states:

> A contested claim exists when the employer knows or reasonably should know that the employee is claiming entitlement to any benefit arising out of a claimed industrial injury and one of the following conditions exists:
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> (1) The employer rejects liability for a claimed benefit.
> (2) The employer fails to accept liability for benefits after the expiration of a reasonable period of time within which to decide if it will contest the claim.
> (3) The employer fails to respond to a demand for payment of benefits after the expiration of any time period fixed by statute for the payment of indemnity.
>
> (Lab. Code, § 4620(b).)

"contested claim" as outlined for purposes of addressing medical-legal expenses to define what constitutes a "dispute" in section 4060.

Defendant notes that Administrative Director (AD) Rule 30(d)(1) is silent regarding an employee's right to request a QME panel to address compensability.[8] Rule 30(d)(1) does not state that only the employer may request a QME panel under section 4060 and an interpretation of the Rule that it precludes an employee from requesting a panel would conflict with sections 4060 and 4062.2. Moreover, "such an interpretation is not required by the language of the regulation, which states that an insurer or employer may request a QME panel, but does not state that an injured worker may not." (*Sanchez v. Grapevine Catering* (March 11, 2016, ADJ10029050) [2016 Cal. Wrk. Comp. P.D. LEXIS 136] at p. *7 [the Appeals Board found that the Medical Unit incorrectly interpreted AD Rule 30(d)(1) to mean that only the employer request a QME panel during the 90-day delay period of section 5402(b)].)

Therefore, applicant's initial panel request was validly made. Panel number 2533182 was issued as a replacement QME panel from applicant's initial request and is consequently the panel the parties must utilize. In light of this finding, we see no reason to address whether defendant was estopped from objecting to applicant's initial panel request.

III.

We agree with the WCJ that defendant's March 31, 2020 denial notice was proper notice to submit a QME panel request for the 2020 cumulative trauma claim (ADJ12949334). (See *Bahena*, *supra*.) However, section 4062.3(j) requires the medical evaluator to "address all contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's initial appointment with the medical evaluator." (Lab. Code, § 4062.3(j); see also Lab. Code, § 4064(a) ["Each comprehensive medical-legal evaluation shall address all contested medical issues arising from all injuries reported on one or more claim forms…"].) The

[8] AD Rule 30(d)(1) states:

> After a claim form has been filed, the claims administrator, or if none the employer, may request a panel of Qualified Medical Evaluators only as provided in Labor Code section 4060, to determine whether to accept or reject a claim within the ninety (90) day period for rejecting liability in Labor Code section 5402(b), and only after providing evidence of compliance with Labor Code Section 4062.1 or 4062.2.
>
> (Cal. Code Regs., tit. 8, § 30(d)(1).)

Appeals Board has held en banc as follows: "Because the date the claim form is filed with employer is the operative act, the date of filing of the claim form determines which evaluator must consider which injury claim(s)." (*Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418, 424 (Appeals Board en banc).) The *Navarro* decision further held "that the Labor Code requires that an evaluator discuss all medical issues arising from all reported claims of injury at the time of an evaluation." (*Id.* at p. 425.)

The record in this matter reflects that the DWC-1 claim form for the 2020 claim was filed on January 23, 2020. (See *Faulkner v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 1161 (writ den.) [the Court of Appeal found that the WCAB may take judicial notice of the DWC-1 claim form even if it has not been admitted into evidence].) Both DWC-1 claim forms for the two cumulative trauma claims have therefore been filed. The record further reflects that although an appointment was scheduled with the remaining physician from panel number 2533182, Dr. Lin, this appointment was cancelled due to the parties' panel dispute. (Applicant's Exhibit No. 16, Applicant attorney's appointment notice regarding panel QME Eduardo Lin, M.D., May 6, 2020; Applicant's Exhibit No. 19, Applicant attorney's letter regarding cancelled appointment with Dr. Lin, May 28, 2020.) The medical evaluator is obligated to address all reported claims of injury at the time of an evaluation, which here includes both the 2019 and 2020 cumulative trauma claims.[9] In the event that there are disputed medical issues in either claim that Dr. Lin is unable to address, it is incumbent on the QME to address those issues he is able to address and to advise the parties of any disputed medical issues outside of his scope of practice and area of clinical competency. (Cal. Code Regs., tit. 8, § 35.5(c)(1) and (d).)

We therefore conclude that defendant's panel request was invalid because applicant's two cumulative trauma claims must be evaluated utilizing panel number 2533182.

IV.

Section 5813 permits an order for attorney's fees and costs "as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813(a); see also Cal. Code Regs., tit. 8, former § 10561, now § 10421 (eff. Jan. 1, 2020).)

Applicant contends that defendant's April 15, 2020 panel request constitutes bad faith conduct warranting attorney's fees. There is insufficient evidence in the record to support a finding

[9] We make no comment with respect to whether the specific injury claim must also be evaluated using panel number 2533182 since whether this panel also governs that claim was not raised as an issue at trial.

that defendant acted in bad faith in requesting a panel for the 2020 cumulative trauma claim. (*Hamilton v. Lockheed Corp.* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be supported by substantial evidence in the record].) Applicant's request for attorney's fees from her April 17, 2020 Petition will be denied.

In conclusion, we will grant reconsideration, rescind the F&O and issue a new decision as outlined herein.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Order and Opinion on Decision issued by the WCJ on December 21, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Order and Opinion on Decision issued by the WCJ on December 21, 2020 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. AMARJEET GILL, Applicant, while employed on December 2, 2019, at the age of 55, as a district attorney investigator, occupational group number 490, for the County of Fresno, sustained an injury arising out of and occurring in the course of employment to the left shoulder (ADJ12918124).

2. Applicant, while employed during the cumulative trauma period of October 2, 1995, through December 18, 2019, at the age of 55, as a district attorney investigator, occupational group number 490, for the County of Fresno, claims injury arising out of and occurring in the course of employment to the neck, lower back, shoulders, wrists, hands, diabetes, alopecia, and hiatal hernia (ADJ12918126).

3. Applicant, while employed during the cumulative trauma period of October 2, 1995, through January 23, 2020, at the age of 55, as a district attorney investigator, occupational group number 490, for the County of Fresno, claims injury arising out of and occurring in the course of employment to the bilateral wrists and bilateral hands (ADJ12949334).

4. At the time of the three claims of injury the employer was permissibly self-insured.

5. Applicant's January 23, 2020 letter demanding a medical evaluation to resolve compensability of the cumulative trauma injury claim through December 18, 2019 was legally sufficient to trigger the 10-day timeframe to request a panel.

6. The record does not support a basis to strike panel number 2533182.

7. The issue of whether defendant was estopped from objecting to applicant's initial panel request via its March 16, 2020 letter is moot.

8. Defendant's April 15, 2020 QME panel request is barred pursuant to Labor Code sections 4062.3 and 4064 and panel number 7328637 is therefore invalid.

9. There is insufficient evidence to demonstrate that defendant's April 15, 2020 panel request was submitted in bad faith.

ORDERS

IT IS ORDERED that panel number 7328637 is invalid.

IT IS FURTHER ORDERED that the parties must utilize panel number 2533182 for ADJ12918126 and ADJ12949334.

IT IS FURTHER ORDERED that applicant's April 17, 2020 Petition requesting attorney's fees is denied.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 25, 2021

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

AMARJEET GILL
BRADFORD & BARTHEL
LAW OFFICE OF DAN EPPERLEY & ASSOCIATES

AI/*pc*

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