WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANITA STAGI, *Applicant*

vs.

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

Adjudication Number: ADJ14533246
San Jose District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

Applicant seeks removal or in the alternative reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 21, 2022. By the F&O, the WCJ found that applicant's objection to the report of the qualified medical evaluator (QME) was defective. The WCJ issued an order denying applicant's request for a replacement panel.

Applicant contends that she is entitled to a replacement QME panel per administrative director (AD) Rule 31.5(a)(12) because she objected to the QME Dr. Benjamin Schanker's report as untimely prior to service of his report.

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 arising out of and in the course of employment, jurisdiction, the existence of an employment 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.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, applicant is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (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, § 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).) Here, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

With respect to the dissent, we find the majority's analysis in *Noriega v. Best Western Town & Country* (January 9, 2015, ADJ9163491, ADJ9163494) [2015 Cal. Wrk. Comp. P.D. LEXIS 8][1] to be more persuasive. Similar to in *Noriega*, applicant objected to the timeliness of the QME's report before its receipt, but did not request a replacement QME panel until after she had received Dr. Schanker's report. We defer to the WCJ's discretion to prevent this kind of "doctor shopping."

Therefore, we will deny the Petition as one seeking reconsideration.

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[1] 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); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to *Noriega* because it considered a similar issue.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of Findings and Order issued by the WCJ on January 21, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

I DISSENT (see separate dissenting opinion),

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 11, 2022

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

ANITA STAGI
LAW OFFICES OF NOEL HIBBARD
WITKOP LAW GROUP

AI/*pc*

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

DISSENTING OPINION OF DEPUTY COMMISSIONER SCHMITZ

I respectfully dissent. I would grant applicant's Petition, rescind the F&O and issue a new decision finding that applicant is entitled to a replacement QME panel per AD Rule 31.5(a)(12).

Labor Code section 4062.5 states:

> If a qualified medical evaluator selected from a panel fails to complete the formal medical evaluation within the timeframes established by the administrative director pursuant to paragraph (1) of subdivision (j) of Section 139.2, a new evaluation may be obtained upon the request of either party, as provided in Sections 4062.1 or 4062.2.
>
> (Lab. Code, § 4062.5.)

AD Rule 38 provides the QME with 30 days to issue an initial comprehensive medical-legal evaluation report. (Cal. Code Regs., tit. 8, § 38(a)-(b).) AD Rule 31.5(a)(12) permits a replacement QME panel to be issued at a party's request in relevant part:

> (a) A replacement QME to a panel, or at the discretion of the Medical Director a replacement of an entire panel of QMEs, shall be selected at random by the Medical Director and provided upon request whenever any of the following occurs: . . .
>
> (12) The evaluator failed to meet the deadlines specified in Labor Code section 4062.5 and section 38 (Medical Evaluation Time Frames) of Title 8 of the California Code of Regulations and **the party requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report.** A party requesting a replacement on this ground shall attach to the request for a replacement a copy of the party's objection to the untimely report.
>
> (Cal. Code Regs., tit. 8, § 31.5(a)(12), emphasis added.)

By its express language, AD Rule 31.5(a)(12) only requires that a party object to the timeliness of a report prior to the date the report is served. As outlined in the dissent's analysis in *Noriega v. Best Western Town & Country* (January 9, 2015, ADJ9163491, ADJ9163494) [2015 Cal. Wrk. Comp. P.D. LEXIS 8], there is no requirement that a party must also submit its replacement panel request prior to receipt of the report.

In this matter, there does not appear to be a real dispute that applicant was not served with the QME's report within the requisite timeframe. Applicant was evaluated by the QME on May 11, 2021. Although there is a proof of service attached to the QME's report stating that it was

faxed to applicant's attorney on June 12, 2021, defendant does not dispute applicant's assertion that she was not served with the report. Applicant objected to the QME's report on June 29, 2021 and requested a replacement panel on July 6, 2021. Pursuant to AD Rule 31.5(a)(12), applicant's objection to the report was prior to service of the report on her and she is entitled to a replacement QME panel.

Therefore, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

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ANITA STAGI
LAW OFFICES OF NOEL HIBBARD
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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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