

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

ADRIANA PACHECO, *Applicant*

vs.

**CALICO BUILDING SERVICES, INC.; BERKSHIRE HATHAWAY HOME STATE
INSURANCE COMPANY, dba BERKSHIRE HATHAWAY HOME STATE
COMPANIES, *Defendants***

Adjudication Number: ADJ11662102

Oakland District Office

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

Applicant seeks removal of the Findings and Order (F&O) issued on March 6, 2023, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) Dr. Fred Blackwell served as the QME and the parties settled the case on July 19, 2019; (2) a petition to reopen was filed on January 13, 2022; and (3) applicant's January 19, 2023 cover letter to QME Dr. Blackwell ahead of his reevaluation scheduled for January 23, 2023 was not served on the opposing party twenty days in advance as required by Labor Code Section 4062.3,¹ and defendant properly objected to the letter and is entitled to a replacement QME panel.

The WCJ ordered that defendant file a proposed order for a replacement QME panel.

Applicant contends that the WCJ erred by finding defendant entitled to a replacement QME panel without evaluating the factors for determining the appropriate remedy for a section 4062.3 violation as required by *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will grant removal, and, as our Decision After Removal, we will affirm the F&O, except that we will amend to find

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

that defendant is not entitled to a replacement QME panel and to order that defendant's request for a replacement QME panel is denied.

FACTUAL BACKGROUND

In the Report, the WCJ states:

On February 17, 2018, Petitioner Applicant Adriana Pacheco suffered an injury to her neck and right shoulder and the claim is adjusted by defendant Berkshire Hathaway Homestate Insurance Companies. The parties settled by stipulations and the Award issued on July 19, 2019.

On January 13, 2022, Applicant filed a Petition to Reopen her case.

At a hearing on August 25, 2022, there was a dispute about applicant's right for a reevaluation with panel QME Dr. Fred Blackwell and Minutes of Hearing by Presiding Judge Lam on August 25, 2022 indicate his intent to issue an order allowing a QME reevaluation with Dr. Blackwell.

On September 1, 2022, Judge Lam issued an Order Allowing QME Re-Evaluation with Dr. Blackwell.

An appointment for reevaluation was set with Dr. Blackwell on **January 23, 2023**.

On December 1, 2022, Defendant served on applicant's attorney Defendant's proposed cover letter to Panel QME. (Ex. 3.) Defendant's cover letter of December 1, 2022, states:

"Based on your earlier evaluation and reports, on July 25, 2019, applicant received a stipulated Award of 8% permanent disability and further medical treatment for her neck and right shoulder because of the February 2017 industrial injury herein.

"After the Award was issued, applicant received extensive conservative medical treatment, including completing a functional restoration program. She continues to treat, primarily with requests for massage therapy.

"Meanwhile, on September 27, 2021 applicant was assaulted in a parking lot and she claims that her condition worsened as a result of that attack. [Whether the attack and the consequences of it are related to treatment for the work injury, as applicant claims, or to a non-industrial, personal lunch and spa appointment, as defendant claims, is disputed and, obviously, to be resolved by the parties or, if necessary, WCAB. Thus, please do not offer an opinion one way of the other.]" (Ex. B at 1.)

Subsequently, as there was no objection, the same cover letter was sent to the QME on December 22, 2023. (Ex. B.)

On **January 19, 2023**, at 6:03 p.m., applicant’s attorney served the proposed cover letter to the QME on defendant. (Ex. 4.) Applicant’s exhibits show receipt by defendants via email within a day. (Exhibits 5, 6, 7.)

In substance, the QME cover letter dated January 19, 2023, Applicant’s Exhibit 4, states that applicant’s case involves the injury of February 17, 2018 to the neck and right shoulder which is now reopened on the grounds that her condition has worsened. (Ex. 4 at 1.) On page 2, section 2 entitled “COMPENSABLE CONSEQUENCE INJURIES,” the letter responds to defendant’s cover letter as follows:

“As noted in Defendant’s cover letter dated 12-1-22, Ms. Pacheco was assaulted in a parking lot. What the Defendant did not state is that Ms. Pacheco alleges she was in that parking lot attending an approved Functional Restoration Program. As the result of that attack, she is claiming to have injured the following body parts:

Bilateral Shoulders
Bilateral Arms
Bilateral Knees
Right Ankle
Back
Buttocks
Head
Teeth
Vision

“After examining these body parts, do you see any injuries that are significant enough from this incident that you believe caused permanent disability?” (Ex. 4 at 2.)

On January 23, 2023, the day of the reevaluation, applicant’s attorney again effectuated service of its QME cover letter to defendants. Applicant’s attorney emailed the cover letter to Berkshire’s email address for service. (Ex. 8.) Applicant’s email is time stamped 12:28 p.m., which is after the time for applicant’s reevaluation. The email address is a generic mailbox for service: inhouseservice@bhhc.com. This time, however, applicant attorney’s email bounced back as “rejected by the email server.” (Ex. 9.) As a result, the letter was placed in the mail addressed to defendant’s law firm. (Ex. 10.) The parties indicate that the reevaluation took place as scheduled on January 23, 2023, but because of this dispute, the QME report was not admitted into evidence.

On January 30, 2023, defendant objected to applicant’s QME letter and information sent to Dr. Blackwell pursuant to Labor Code section 4062.3. (Ex. A.)

At trial, it was determined that Applicant’s cover letter of January 19, 2023 to the QME for the reevaluation set on January 23, 2023 was not served on the defendant 20 days in advance of the evaluation as required by Labor Code Section 4062.3. Defendant’s objection of January 30, 2023 was deemed timely and valid, and as a result, defendant’s request for a replacement QME panel was granted.

...

Clearly, the cover letter of January 19, 2023 to the QME for the reevaluation set on January 23, 2023 was not served on the defendant twenty days in advance of the evaluation as required by Labor Code Section 4062.3. Sections 4062.3(b) and (e) are mandatory as each party “shall” comply with service of both information and communications intended for the QME twenty days in advance of the evaluation. The plain reading of the statute requires strict application. Applicant’s cover letter, served on defendant on January 19, 2023 after close of business for the evaluation date of January 23, 2023 was in violation of Labor Code section 4062.3. Defendant’s objection dated January 30, 2023, was within ten calendar days of the first service of applicant’s cover letter and is timely and valid.

In the Petition for Removal, Applicant contends that despite the record and the statute, defendant should not automatically be entitled to a new QME panel and the Appeals Board has latitude in denying defendant’s request under *Suon v. California Dairies* (2018) 83 Cal. Comp. Cases 1803 (Appeals Board en banc). The *Suon* decision outlines factors to consider in determining an appropriate remedy for a violation of the applicable statute. In this case, petitioner alleges there is no prejudicial impact on defendant by applicant asking the QME to address the disputed body parts. Further, defendant provided no evidence that the QME actually received applicant’s cover letter of January 19, 2023. Finally, the QME has previously reported on the case and his reporting was used to help the parties settle by Stipulations and Award in July of 2019.

In most cases, the subject of a petition to reopen is limited to the injured body parts for which an award has issued. On July 19, 2019, an award of permanent disability and medical treatment issued for body parts of neck and right shoulder. Substantively, applicant’s cover letter of January 19, 2023 seeks to expand the scope of the QME evaluation under section 2 entitled “Compensable Consequences.” Comparison of defendant’s cover letter of December 1, 2022 with applicant’s cover letter shows that the latter conveys new facts. Applicant’s letter is intended to correct defendant’s cover letter. At page 2, regarding the compensable consequence injury, applicant points out that defendant’s cover letter “did not state” that applicant was attacked while she “was in that parking lot attending an approved Functional Restoration Program.” (Ex. 4 at 2.) Applicant’s letter of January 19, 2023 then lists newly injured body parts to be examined including bilateral shoulder, bilateral arms, bilateral knees, right ankle, back, buttocks, head, teeth and vision and requests the QME to opine if injuries are “significant enough to cause permanent disability.” (Ex. 4 at 2.) Defendant, on the other hand, requests that the QME not offer an opinion on “the attack and the consequences of it.” (Ex. B at 1.) Defendant’s cover letter contends that applicant also had a “personal lunch date and spa appointment” but applicant’s cover letter is silent on this assertion. (Ex. B at 1.)

When the cover letters are considered together, there are different and distinct mechanisms of injury suggested: a medical appointment, a personal lunch, and a spa visit. It is unclear whether Dr. Blackwell is to opine on the newly alleged facts or not, or whether there is any agreement or evidence regarding the newly alleged

body parts and whether he should opine on any or all of the newly alleged body parts. Taken together, the letters are confusing as to the nature and extent of the reevaluation. The record is devoid of any effort by the parties to agree upon the facts. In light of the record, defendant is prejudiced as being unable to respond to applicant's cover letter before the evaluation.

Moreover, applicant was on due notice of the disputed factual issues and defendant's objection to any QME at this juncture as this was the subject of a hearing as memorialized in Minutes of Hearing by Judge Lam on August 25, 2022 indicating his notice of intent to issue an order allowing a QME reevaluation with Dr. Blackwell. Subsequently, on September 1, 2022 an Order Allowing QME Re-Evaluation with Dr. Blackwell by Judge Lam. Defendant was timely in service of its cover letter and in compliance with the law and should not be placed in a position of disadvantage.

Applicant's second argument, that defendant provided no evidence that the QME actually received applicant's cover letter of January 19, 2023 is specious. Applicant attorney's office was in control of serving its own letter on the QME and if they failed to do so, they could have notified defendant in mitigation and there would be no issue today.

Finally, the fact that Dr. Blackwell was the prior QME is not critical at this juncture as his reporting came to conclusion over three years ago and is the basis for an award an Award of July 19, 2019. If Dr. Blackwell had retired or was otherwise unavailable as a QME, a new panel QME would be appropriate and the new QME would have a complete record by Dr. Blackwell to consider. In other words, a QME evaluation now for the Petition to Reopen is akin to an initial evaluation and neither party is prejudiced in proceeding with a new QME. (Report, pp. 2-8.)

DISCUSSION

We observe that 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; see also *Cortez, supra*; *Kleemann, supra*.) In addition, 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.)

The Petition before us contends that the WCJ erred by finding defendant entitled to a replacement QME panel without evaluating the factors for determining the appropriate remedy for

a section 4062.3 violation as required by *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803.

We observe that section 4062.3 provides:

(a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:

(1) Records prepared or maintained by the employee's treating physician or physicians.

(2) Medical and nonmedical records relevant to determination of the medical issue.

(b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.

(§ 4062.3(a)-(b).)

Here, the record shows that applicant sent the January 19, 2023 cover letter to the QME without serving defendant a copy twenty days beforehand, and we concur with the WCJ's opinion that the letter provided information in violation of section 4062.3(b).

While the Labor Code provides no statutory remedy for a section 4062.3(b) violation, the Appeals Board has wide discretion to determine what, if any, remedy is appropriate. (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1815 (Appeals Board en banc).)

The *Suon* decision set forth factors the trier of fact may consider, as relevant, to determine the appropriate remedy for a party's section 4062.3(b) violation. These factors include the following:

1. The prejudicial impact versus the probative weight of the information.
2. The reasonableness, authenticity and, as appropriate, relevance of the information to determination of the medical issues.
3. The timeline of events including: evidence of proper service of the information on the opposing party, attempts, if any, by the offending party to cure the violation, any disputes regarding receipt by the opposing party and when the opposing party objected to the violation.

4. Case specific factual reasons that justify replacing or keeping the current QME, including the length of time the QME has been on the case.
5. Whether there were good faith efforts by the parties to agree on the information to be provided to the QME.
6. The constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) (*Id.*, pp. 1815-1816.)

In this case, as stated in the Report, applicant's January 19, 2023 cover letter may confuse issues in that it identifies a wide range of medical questions potentially subject to evaluation by the QME. (Report, pp. 6-7.) However, we are unable to discern evidence that any confusion of issues on the part of the QME resulted from the letter or caused prejudice to defendant. In any event, the parties remain able to object to any opinions of the QME that exceed his scope of work and the WCJ may then develop the record thereon.

Consequently, we do not conclude that the prejudicial impact of the letter outweighs its probative value to a degree warranting dismissal of Dr. Blackwell as QME. Nor do we conclude that the information provided by the letter was unreasonable or irrelevant to Dr. Blackwell's evaluation.

Additionally, pursuant to *Suon*, we have considered the length of time Dr. Blackwell has served as QME in this case and are persuaded that his years-long involvement adds considerably to his ability to evaluate the medical issues herein.

Accordingly, we will grant removal and, as our Decision After Removal, we will affirm the F&O, except that we will amend to find that defendant is not entitled to a replacement QME panel and to order that defendant's request for a replacement QME panel is denied.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Findings and Order issued on March 6, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal, that the Findings and Order issued on March 6, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

4. Defendant is not entitled to a replacement QME panel.

ORDER

Defendant's motion for a replacement QME panel is denied.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 9, 2023

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

**ADRIANA PACHECO
RAYMOND E. FROST & ASSOCIATES
LAW OFFICES OF KAPLAN & BOLDY**

SRO/cs

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

CS