

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SCOTT BEAR, *Applicant*

vs.

**CVS HEALTH CORPORATION;
XL INSURANCE AMERICA, INC., administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ11412367
Pomona District Office**

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

Defendant, XL Insurance America, Inc., seeks removal of the Findings and Orders and Opinion on Decision (F&O) issued by a workers' compensation administrative law judge (WCJ) on October 21, 2022. By the F&O, the WCJ found in relevant part that applicant is entitled to a replacement qualified medical evaluator (QME) panel in the specialty of neurology. The WCJ also found that the parties' disputes over what documents defendant could provide to the QME, and whether applicant had timely objected to those documents, were not yet "ripe" for adjudication, as the new QME had not yet been selected from the panel.

Defendant contends that applicant failed to demonstrate that he was entitled to a replacement QME panel. Defendant also contends that the WCJ's failure to rule upon the remaining issues deprived it of due process.

We did not receive an Answer from applicant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of defendant's Petition for Removal and the contents of the WCJ's Report.¹ Based on our review of the record, and for the reasons discussed below, we will grant removal, and, as our Decision After Removal, we will not disturb the WCJ's decision to grant applicant's request for a new neurology QME panel. However, we will rescind the F&O and substitute a new F&O which does not include the WCJ's findings related to "ripeness" and return the matter to the trial level for further proceedings and decision by the WCJ consistent with this opinion and the mandates of due process.

FACTUAL BACKGROUND

On July 7, 2018, applicant sustained injury arising out of and in the course of employment (AOE/COE) to his head, neck, and left trapezius, and claims to have sustained injury AOE/COE to the brain, headache, neurological, psyche, sleep disorder, and other body parts.

The parties obtained Dr. Khaled Adam Anees as the neurological QME from a panel list issued on June 30, 2021. (Def. Exh. M.) By letter dated August 17, 2021, defendant served applicant's attorney with a proposed advocacy letter to Dr. Anees, requesting his medical opinion on, among other things, causation of applicant's injury and disability (if any). Defendant also notified applicant's attorney of its intent to provide Dr. Anees with deposition transcripts from two witnesses, Christina Navarro and Natalie McCray, for his review. On August 25, 2021, applicant objected to the provision of said documents to Dr. Anees. (App. Exhs. 16-17.)

On October 8, 2021, applicant's attorney also emailed defense counsel, indicating her intent to seek a replacement QME panel due to Dr. Anees's inability to evaluate applicant at the office listed on the QME panel selection form. (App. Exh. 26, p. 3.) On October 13, 2021, applicant's attorney filed her request for a replacement QME panel with the Workers' Compensation Medical Unit. (Def. Exh. S.)

On August 25, 2022, the WCJ held a hearing to address the parties' various disputes over the issues concerning the QME. The issues were framed as follows:

1. Whether the language from defense attorney's proposed PQME position statement that applicant's attorney is objecting to is "information" subject to Labor Code Section 4602.3(b).

¹ Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

2. Whether defense attorney's proposed PQME letter may be served to Dr. Anees or the replacement PQME in this case, with the language objected to by applicant's attorney included.
3. Whether applicant's attorney timely objected to the deposition transcripts of Christina Navarro and Natalie McCray being served to the med-legal provider or providers in this case.
4. Whether the deposition transcripts of Christina Navarro and Natalie McCray may be served to the med-legal provider or providers in this case prior to the initial evaluation.
5. Whether disputes regarding defense attorney's proposed PQME letter served on August 17, 2021 and service of the witness deposition transcripts are ripe for adjudication if the identity of the PQME and/or date of the evaluation appointment is not certain.
6. Whether applicant's attorney's request for replacement panel pursuant to CCR Section 31.5(a)(2) dated October 13, 2021 is proper and should result in a replacement panel.
7. Whether replacement of PQME Dr. Anees is appropriate pursuant to CCR Section 34(b).
8. Whether applicant's attorney's objection to the location of the December 7, 2021 appointment which applicant attorney scheduled is a good faith basis for the request of a replacement QME panel.
9. Whether applicant's attorney's scheduling of the QME evaluation with Dr. Anees set for December 7, 2021 at an address different than the one listed on the QME panel is substantial evidence that Dr. Anees is unable to comply with CCR Section 34(b).

(Minutes of Hearing (MOH), August 25, 2022, pp. 2-3.)

On October 21, 2022, the WCJ issued the disputed F&O, granting applicant's request for a replacement neurology QME panel. (F&O, October 21, 2022, pp. 1-2, Findings of Fact Nos. 7-10.) The WCJ found that a new QME panel was mandatory pursuant to AD Rules 31.5(a)(11) and 34(b). However, the WCJ found that, until a new QME was selected, matters concerning the documents that defendant proposed to provide to the QME, and applicant's objection(s) thereto, as presented in Issue Nos. 1-5 of the MOH were not yet "ripe" for adjudication. (F&O, pp. 1-2, Findings of Fact Nos. 2-6.)

On November 18, 2022, defendant filed its timely Petition for Removal of the F&O.

DISCUSSION

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] (*Cortez*); *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*, at p. 601.) 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.)

Defendant first contends that the WCJ erred in finding that AD Rules 31.5(a)(11) and 34(b) required a replacement QME panel in this case.

AD Rule 31.5(a)(11) provides:

(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:

(11) The evaluator has violated section 34 (Appointment Notification and Cancellation) of Title 8 of the California Code of Regulations, except that the evaluator will not be replaced for this reason whenever the request for a replacement by a party is made more than fifteen (15) calendar days from either the date the party became aware of the violation of section 34 of Title 8 of the California Code of Regulations or the date the report was served by the evaluator, whichever is earlier.

(Cal. Code Regs., tit. 8, § 31.5(a)(11).)

AD Rule 34(b) states, in relevant part:

The QME shall schedule an appointment for the first comprehensive medical-legal examination which shall be conducted at a medical office listed on the panel selection form....

(Cal. Code Regs., tit. 8, § 34(b).)

Defendant contends that, in order to replace a QME panel under AD Rule 31.5(a)(11), the WCJ must find that the QME has violated Rule 34, and that the WCJ made no such finding here. (Petition, p. 7.) Defendant argues that, in fact, it was applicant's attorney, rather than Dr. Anees,

who scheduled the initial medical examination at the wrong location in violation of AD Rule 34(b) and that, as a result, a replacement panel was not required under AD Rule 31.5(a)(11). We disagree.

Under AD Rule 34(b), not only must the first medical-legal examination be scheduled at the doctor's office listed on the panel selection form, but it must also be *conducted* at said office. (Cal. Code Regs., tit. 8, § 34(b).) Here, the evidence shows that applicant's attorney attempted to schedule the initial examination at Dr. Anees's office in Fontana, as listed on the panel selection form, but was unsuccessful in doing so due to a lack of availability. In an email dated October 8, 2021, applicant's attorney advised defense counsel of this issue, stating:

[M]y case manager....tried to reschedule the PQME Dr. Anees appointment but they advised that there are no appointments available at the Fontana location (location on panel sheet) so he's been scheduled at the Rialto location. In light of the circumstances, we will obtain a replacement panel.

(App. Exh. 26, p. 3.)

Because Dr. Anees's office was unable to comply with its obligation to conduct the initial medical-legal examination at the office listed on the panel selection form, the doctor's office violated the requirements of AD Rule 34(b). Further, the record shows that applicant's attorney requested a replacement panel within the 15-day limit set forth in AD Rule 31.5(a)(11), and, as a result, a replacement QME panel was required. (App. Exh. 26, pp. 3-7; Def. Exh. S.) Therefore, based on the record before us, we do not see that defendant will suffer significant prejudice or irreparable harm as a result of a mandatory panel replacement.²

However, we do agree with defendant that the WCJ should have decided the remaining issues related to the documents that defendant proposed to provide to the QME and applicant's objection(s) thereto. (MOH, August 25, 2022, pp. 2-3, Issue Nos. 1-5; F&O, pp. 1-2, Findings of Fact Nos. 2-6.)

A WCJ is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the

² We do not include the WCJ's finding that Dr. Anees's ability to comply with AD Rule 34(b) is "irrelevant." (F&O, p. 2, Finding of Fact No. 10.) As explained above, a doctor's inability to comply with AD Rule 34(b) is part and parcel of a Rule 31.5(a)(11) violation, and the inclusion of this finding confuses the issues at hand.

proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Board en banc).)³ The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [issues must be decided by the WCJ in a subsequent opinion consistent with the mandates of due process]; see also Cal. Code Regs., tit. 8, §§ 10787, 10803, 10832, 10421.)

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476.) As required by Labor Code section 5313⁴ and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton* at p. 475.) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, “the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Ibid.*; see also Cal. Code Regs. tit. 8, § 10787(c)(3).)

Here, the August 25, 2022 MOH clearly shows that the parties submitted the issues of defendant’s proposed documents and the timeliness of applicant’s objections for trial, and the relevant evidence was admitted into the record. (MOH, August 25, 2022, pp. 2-3, Issue Nos. 1-5; App. Exh. 18, Proposed QME Letter; Joint Exh. 2, Deposition of Christina Navarro; Joint Exh. 3, Deposition of Natalie McCray; App. Exhs. 16-17, Applicant’s Attorney’s Objections; Joint Exh. 9, Applicant’s Attorney’s Revised Objections.) Thus, the WCJ should have decided these issues and should have prepared a record that complies with the standards set forth in section 5313, *Hamilton*, and *Blackledge, supra*.

We also agree with defendant that the fact that a replacement QME had not yet been selected from the panel did not mean that these matters were not yet “ripe” for adjudication. (F&O, pp. 1-2, Findings of Fact Nos. 2-6.) The WCJ’s decision on these matters did not hang upon the QME’s identity, but rather the contents of the records themselves. (*Suon v. California Dairies*

³ En banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs. tit. 8, § 10325.)

⁴ All further statutory references are to the Labor Code unless otherwise noted.

(*Suon*) (2018) 83 Cal.Comp.Cases 1803 (Appeals Board en banc); *Maxham v. California Department of Corrections and Rehabilitation (Maxham)* (2017) 82 Cal.Comp.Cases 136, 147 (Appeals Board en banc); Lab. Code, § 4062.3.) As we explained in *Suon* and *Maxham*, if the parties cannot agree on what documents to provide to a QME, the trier of fact is empowered to determine this issue. Additionally, a party's objections are relevant under section 4062.3(b) to the extent that nonmedical "information" may be involved. In *Suon*, we stated:

...[I]f the opposing party timely objects to nonmedical records proposed to be served to the QME, those records shall not be provided to the evaluator pursuant to the plain language of section 4062.3(b) *unless the trier of fact so orders*.

(*Id.* at p. 1812, emphasis added; Lab. Code, § 4062.3(b).)

Consequently, the matters pertaining to defendant's proposed documents, and applicant's objection(s) thereto, as set forth in Issue Nos. 1-5 of the August 25, 2022 MOH, must be decided, and the WCJ's failure to do so conflicts with *Suon* and *Maxham*, as well as the mandates of *Hamilton*, *Blackledge*, and section 5313.

We will thus grant defendant's Petition for Removal and substitute a new F&O which includes the WCJ's findings as to applicant's entitlement to a replacement panel. Upon return, the WCJ should make findings on the remaining issues, as identified in the August 25, 2022 MOH, and prepare an Opinion on Decision that explains the reasons for his findings and references the evidence relied on. (Lab. Code, §§ 5313, 5277(b).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the October 21, 2022 F&O is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the October 21, 2022 F&O is **RESCINDED**, and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Exhibits 24 and 25 are admissible.
2. Applicant's attorney's request for a replacement panel pursuant to CCR Section 31.5(a)(2) dated October 13, 2021 was the result of excusable mistake.
3. Replacement of PQME Dr. Anees is mandatory pursuant to CCR Sections 31.5(a)(11) and 34(b).

4. Applicant's attorney's objection to the location of the December 7, 2021 appointment which applicant attorney scheduled is a sufficient basis for the request of a replacement QME panel.

ORDERS

IT IS ORDERED THAT Exhibits 24 and 25 are hereby admitted into evidence.

IT IS FURTHER ORDERED that the Medical Unit issue a replacement panel list in the specialty of neurology (MPN). The existing panel number is 2718274. The Applicant's residential zip code for purposes of selection of a random panel of evaluators is 91761, per the official address record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 8, 2023

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

**SCOTT BEAR
ODJAGHIAN LAW GROUP
PEARLMAN, BROWN & WAX**

AH/cs

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