

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

**MARIA GARCIA-CERVANTES, *Applicant***

**vs.**

**PITMAN FARMS, permissibly self-insured,  
administered by RISICO CLAIMS MANAGEMENT, *Defendants***

**Adjudication Number: ADJ14388789  
Fresno District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant sought removal of the Findings of Fact, Order and Opinion on Decision (F&O) issued by the workers' compensation administrative law judge (WCJ) on October 8, 2021. By the F&O, the WCJ found in relevant part that defendant was not precluded from requesting a qualified medical evaluator (QME) panel per Labor Code<sup>1</sup> section 4062.2 when applicant became represented. (Lab. Code, § 4062.2.)

Applicant contends that she participated in the examination with the first QME to the extent that she could due to a lack of an interpreter being present. She also contends that defendant waived its right to request a QME panel by participating in the first two appointments with the first QME.

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

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 affirm the F&O.

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

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

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 (AOE/COE), 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 of injury AOE/COE. Injury AOE/COE is a threshold issue fundamental to the claim of benefits. 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 regarding whether defendant was precluded from requesting a new QME panel. 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).)

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 decline to engender ambiguity regarding what constitutes “participating” in an examination. Pursuant to *Romero v. Costco Wholesale* (2007) 72 Cal.Comp.Cases 824, 825, “for purposes of sections 4062.1(e) and 4062.2(e) [...] an employee has ‘received’ a comprehensive medical-legal evaluation when the employee attends and participates in the medical evaluator’s examination.” In this matter, applicant attempted to participate in an examination with the QME at two appointments, but was unable to participate in an examination due to the lack of an interpreter. No examination was actually conducted by the QME and defendant was thus entitled to request a new panel per *Romero*.

Therefore, we will affirm the F&O.

For the foregoing reasons,

**IT IS 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 October 8, 2021 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I DISSENT (see separate dissenting opinion),**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**JANUARY 10, 2022**

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

**GROVE LAW FIRM  
MARIA GARCIA-CERVANTES  
MICHAEL SULLIVAN & ASSOCIATES**

*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 CHAIR ZALEWSKI

I respectfully dissent. I would grant applicant's Petition, rescind the F&O and issue a new decision finding that defendant is precluded from requesting a new QME panel per section 4062.2 since it was defendant's errors that prevented an examination with the initial QME.

Applicant requested a QME panel while she was unrepresented. She selected a physician from the panel and scheduled an appointment with the selected physician for January 14, 2021. Applicant appeared for the scheduled examination, but at the wrong location because she was given an incorrect address. She proceeded to the correct location, but there was no interpreter present because they had also been given an incorrect address for the appointment. Another appointment was scheduled with the QME for March 18, 2021. Applicant again appeared for the second appointment, but defendant failed to provide an interpreter due to a reported clerical error. A third appointment with the QME was scheduled, but before this could proceed, defendant requested a new panel per *Romero v. Costco Wholesale* (2007) 72 Cal.Comp.Cases 824 on the basis that applicant had become represented and no examination had been conducted with the existing QME.

As acknowledged by the majority, an "employee has 'received' a comprehensive medical-legal evaluation when the employee attends and participates in the medical evaluator's examination." (*Romero, supra*, 72 Cal.Comp.Cases at p. 825.) Applicant attended two appointments with the QME, but was unable to complete the examination with the physician due to defendant's errors in scheduling an interpreter. Under the circumstances here, applicant attended and participated in the examination to the extent she was able to do so. As it was defendant's errors that led to applicant being unable to fully participate in the examination (twice), I would grant applicant's Petition, rescind the F&O and issue a new decision finding that defendant is precluded from requesting a new QME panel.

With respect to the majority's concerns about creating ambiguity regarding what constitutes "participation" in a medical-legal examination, while I agree with that concern in general, here, I do not believe there is any ambiguity. Applicant's inability to actually be examined was due to no fault of her own. She did everything within her power to participate. While defendant may not have intended to mislead applicant, their actions prevented her from completing the examination. Under these circumstances, I believe that applicant has met the "participation" requirement.

Therefore, I dissent.



**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

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Board to this original decision on this date.  
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