

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

ARMANDO DIAZ ESPINOZA, *Applicant*

vs.

**SMITH GARDENS, INC.; FLORISTS' MUTUAL INSURANCE COMPANY,
administered by SENTRY CLAIMS SERVICE, *Defendants***

**Adjudication Number: ADJ14080327
Salinas 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.

Defendant filed a Petition for Removal of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on April 27, 2021. By the F&O, the WCJ found that the qualified medical evaluator (QME) panel obtained by applicant is a valid panel, defendant's objection to the application is a valid basis to obtain a QME panel and the panel obtained by defendant is not valid.

Defendant contends that applicant's QME panel was improperly obtained using its letter objecting to the application and applicant's panel request denied defendant its right to due process.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that defendant's Petition be denied.

We have considered the allegations of defendant's Petition for Removal, applicant'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 rescind the F&O and issue a new decision finding that applicant's panel was invalid, defendant's letter was not a valid basis to obtain a panel and defendant's panel is valid. The parties will be ordered to utilize the QME panel obtained by defendant.

FACTUAL BACKGROUND

Applicant claims injury to the left shoulder, cervical spine, back, hips and arm on October

29, 2020 while employed as a laborer by Smith Gardens, Inc.

On January 7, 2021, applicant's attorney filed an Application for Adjudication of Claim. On January 20, 2021, defendant sent a letter to applicant's attorney with a headline stating "Objection to Application" and the following in the letter's body in its entirety:

We received your application dated January 7, 2021 on January 19, 2021.

This application alleges injury to the applicant's arm, back, hip.

Defendant objects to the alleged injury to the applicant's arm, back, hip as there is no substantial medical evidence that injury to these additional body parts is related to the accepted injury of October 29, 2020 to the applicant's left shoulder, cervical spine. No medical treatment will be authorized for these disputed body parts. Any medical treatment provided for these body parts will be considered self procured and will not be paid.

This is a continuing objection.

(Applicant's Exhibit No. A-1, Objection to Application Letter, Hortica/Florists' Mutual Insurance Company, January 20, 2021.)

On February 4, 2021, applicant's attorney requested a QME panel in physical medicine and rehabilitation utilizing defendant's January 20, 2021 letter and citing Labor Code¹ section 4061. (Defendant's Exhibit No. D-2, QME Panel No. 7389956, February 5, 2021, exh. p. 2.) Panel number 7389956 issued the following day on February 5, 2021. (*Id.* at exh. p. 1.)

Also on February 4, 2021, defendant's attorney filed a notice of representation and sent a letter to applicant's attorney stating in relevant part:

Defendant objects to the report and opinion of the [*sic*] Elias Rodriguez, M.D. dated 01/06/2021 as it pertains to permanent disability, temporary disability and ability to return to work per Labor Code §§4061/4062.

(Defendant's Exhibit No. D-1, Notice of Representation Letter, Stander, Reubens, February 4, 2021, p. 1.)

On February 19, 2021, defendant requested a QME panel in orthopedic surgery using its February 4, 2021 letter to applicant and citing section 4061. (Defendant's Exhibit No. D-3, QME Panel No. 7392377, February 22, 2021, exh. p. 2.) Panel number 7393277 issued on February 22,

¹ All further statutory references are to the Labor Code unless otherwise stated.

2021 in response. (*Id.* at exh. p. 1.) Defendant sent applicant a letter dated February 23, 2021 objecting to his panel request as obtained without first objecting to an opinion of the primary treating physician per section 4061. (Defendant’s Exhibit No. D-4, Letter, Stander, Reubens, et al., February 23, 2021, p. 1.) An appointment with Melinda Brown, M.D. from the orthopedic QME panel was set for May 17, 2021. (Defendant’s Exhibit No. D-5, QME Appointment Notification Form, Melinda Brown, M.D., March 4, 2021.)

The matter proceeded to trial on March 24, 2021 on the following issues:

- (a) Whether QME Panel No. 7389956 is valid per Labor Code Section 4062.2
- (b) Whether Defendants’ 1/20/21 Objection to Application is a valid basis to obtain a QME panel per Labor Code Section 4061.
- (c) Whether Defendants’ QME Panel No. 7393277 is valid.
- (d) Whether the QME now pending with Dr. Brown should be cancelled.

(Minutes of Expedited Hearing, March 24, 2021, p. 2.)

The WCJ issued the resulting F&O.

DISCUSSION

I.

Defendant 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 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 to the left shoulder and cervical spine. 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.²

II.

Although the decision contains a finding that is final, defendant is only challenging interlocutory findings regarding the validity of the QME panels and whether its letter could be used as a basis to request a panel. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

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; see also Cal. Code Regs., tit. 8, § 30(d)(2) [“Once the claims administrator, or if none, the employer, has accepted as compensable injury to any body part in the claim, a request for a panel QME may only be filed based on a dispute arising under Labor Code section 4061 or 4062”].)

Section 4061 provides as follows in relevant part:

- (b) If either the employee or employer **objects to a medical determination made by the treating physician concerning the existence or extent of**

² The parties stipulated to injury AOE/COE to the left shoulder and cervical spine at trial, as well as to the identity of the carrier at the time of the injury. (Minutes of Expedited Hearing, March 24, 2021, p. 2.) These stipulations were included as findings of fact in the F&O. The parties may stipulate to the facts in controversy and consequently, we will retain these findings of fact in the new decision. (See Lab. Code, § 5702.)

permanent impairment and limitations or the need for future medical care, and the employee is represented by an attorney, a medical evaluation to determine permanent disability shall be obtained as provided in Section 4062.2.

(Lab. Code, § 4061(b), 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.)

Administrative Director (AD) Rule 30 further requires a party requesting a QME panel in a represented case to provide the following documentation when submitting a panel request (if not a panel request under section 4060): “a written objection indicating the identity of the primary treating physician, the date of the primary treating physician’s report that is the subject of the objection and a description of the medical determination that requires a comprehensive medical-legal report to resolve, for disputes covered by Labor Code sections 4061 and 4062.” (Cal. Code Regs., tit. 8, § 30(b)(1)(B)(2).)

In this matter, defendant’s January 20, 2021 letter specified that it has accepted applicant’s injury to the left shoulder and cervical spine. Section 4060(a) expressly states that this section “shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.” Section 4060 consequently does not apply here and a QME panel request could only be requested “the first working day that is at least 10 days after the date of mailing of an objection

pursuant to Sections 4061 or 4062” per section 4062.2(b).

Applicant cited section 4061 as the statutory authority for his panel request. Section 4061 outlines a specific process for objecting to a medical determination by a treating physician to trigger the QME panel process. Specifically, the employee or employer may “[object] to a medical determination made by the treating physician concerning the existence or extent of permanent impairment and limitations or the need for future medical care” per section 4061(b) to initiate the QME panel process. Taken together with the express reference in section 4062.2(b) to an “objection pursuant to Sections 4061 or 4062,” the statutory language mandates that there must have been an objection (by either party) *to a medical determination by a treating physician* in order to initiate the QME panel process under section 4061. However, defendant’s January 20, 2021 letter does not contain an objection to a medical determination by a treating physician; rather, defendant objected to applicant’s assertion of additional body parts in his Application. Based on the language of sections 4061 and 4062.2, this letter cannot be the basis for requesting a QME panel.³

Applicant improperly used defendant’s January 20, 2021 letter to obtain his QME panel. Therefore, his panel is invalid. Alternatively, defendant sent applicant a letter dated February 4, 2021 that did contain an objection to a treating physician’s report and utilized this letter to request a panel. Defendant submitted its panel request on February 19, 2021, which was ten days after the date of mailing of an objection per section 4062.2(b) plus five additional days for mailing per WCAB Rule 10605. (Lab. Code, § 4062.2(b); Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020) [when a document is served by mail, the period for exercising any right is extended by five calendar days from the date of service where the place of mailing is within California].) The request was thus submitted after the requisite time period had passed. Defendant’s panel request was validly made in accordance with sections 4061 and 4062.2, and the parties must utilize panel number 7393277.

Therefore, we will rescind the F&O and issue a new decision finding that applicant’s panel was invalid, defendant’s letter was not a valid basis to obtain a panel and defendant’s panel is valid. The parties will be ordered to utilize the QME panel obtained by defendant.

³ Either party could have initiated the QME panel process pursuant to section 4062, which may also be utilized where at least one body part is accepted as compensable. However, section 4062 similarly requires that the party “objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610...” (Lab. Code, § 4062(a).)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on April 27, 2021 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant, Armando Diaz Espinoza, while employed on 10/29/20, occupational group number deferred, at Watsonville, CA, by Smith Gardens, Inc., sustained injury arising out of and in the course of employment to his left shoulder and cervical spine, and claims to have sustained injury arising out of and in the course of employment to his arm, back, and hip.
2. At the time of the injury, the employer's workers' compensation carrier was Florists' Mutual Insurance Company.
3. QME Panel No. 7389956 is an invalid panel per Labor Code section 4062.2.
4. Defendant's 1/20/21 objection to application is not a valid basis to obtain a QME panel per Labor Code section 4062.2.
5. QME Panel No. 7393277 is a valid panel.

ORDER

IT IS ORDERED that the parties utilize QME panel number 7393277.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 5, 2021

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

**ARMANDO DIAZ ESPINOZA
REDULA & REDULA
STANDER REUBENS**

AI/pc

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