

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

VLADIMIR NAJARRO, *Applicant*

vs.

**CEDARS-SINAL MEDICAL CENTER, permissibly self-insured,
administered by BETA HEALTHCARE GROUP, *Defendants***

**Adjudication Number: ADJ10990990
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant seeks removal of the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on January 28, 2021. By the Findings of Fact, the WCJ found that there was no factual or legal basis to strike the agreed medical evaluator (AME) and denied applicant's petition to strike the AME.

Applicant contends that the AME has a disqualifying conflict of interest and must be struck as the AME.

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 deny the Petition as one seeking reconsideration.

FACTUAL BACKGROUND

Applicant claims injury to his neck, upper extremities, back, shoulders and psyche through May 5, 2017 while employed as a U.M. compliance nurse by Cedars-Sinai Medical Center.

The matter proceeded to a hearing on January 22, 2019. Comments in the minutes of hearing state in relevant part: "AME with Dr. Arnold Gilberg set for 3/5/19 at 9:30." (Minutes of Hearing, January 22, 2019.) Although the reporting is not in evidence, Dr. Gilberg apparently did

evaluate applicant in 2019.

On March 18, 2020, applicant filed a Petition for Replacement Psychiatric (MPD) Panel (Petition). In the Petition, applicant contended that he had discovered that Dr. Gilberg has a disqualifying conflict of interest. Specifically, he stated that Dr. Gilberg is part of the attending staff at Cedars-Sinai and makes rounds with psychiatrists at the hospital. Dr. Gilberg was also listed as part of Cedars-Sinai's network of psychiatrists on the company website. Defendant filed an objection to applicant's Petition on April 16, 2020.

Dr. Gilberg sent a letter to the parties dated March 18, 2020, apparently in response to an inquiry from applicant, stating as follows in relevant part:

I am in receipt of a letter authored by Saam Ahmadiania, Esq., on March 3, 2020, received by my office March 17, 2020. My understanding of 41.5 of the QME regulations is that, if there is any financial interest that I would have with Cedars-Sinai Medical Center, then I would need to disqualify myself. I have been a member of the attending staff for many years but receive no financial remuneration from the medical center. It is true I am a member of the Cedars-Sinai network of psychiatrists, but I have never accepted a referral from the network because, while I am a psychiatrist, I do not customarily provide psychiatric medications. Most referrals from the medical center are for psychiatrists who might evaluate and provide psychiatric medications for a patient.

I have seen many AME cases which include the Medical Center as the employer. I have found on behalf of the injured workers. I am objective and have no bias towards the employer.

(Joint Exhibit Z, Medical report of Arnold Gilberg, M.D., March 18, 2020, p. 2.)

Applicant filed another petition on August 4, 2020 seeking to disqualify Dr. Gilberg as the AME and requesting an order for a psychiatric qualified medical evaluator (QME) panel. Defendant filed an objection to applicant's petition.

The matter proceeded to trial on January 27, 2021 on the following issue:

The only issue today is the applicant's petition to disqualify the Agreed Medical Examiner in psychiatry, Dr. Arnold Gilberg, for failure to advise of a conflict of interest.

(Minutes of Hearing, January 27, 2021, p. 2.)

The sole evidence entered into the record was Dr. Gilberg's March 18, 2020 letter.

The WCJ issued the resulting Findings of Fact as outlined above.

DISCUSSION

I.

Applicant sought removal of the Findings of Fact. 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.)¹ 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.

The Findings of Fact included a finding that applicant “while employed during the period 1/7/15 through 5/5/17 as a U.M. Compliance Nurse” claims injury AOE/COE. The existence of an employment relationship 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.

II.

Although the Findings of Fact contain a finding that is final, applicant only challenges the finding that Dr. Gilberg does not have a disqualifying conflict of interest and denial of the petition to strike him as the AME. This is an interlocutory decision regarding discovery and is subject to

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

the removal standard rather than reconsideration pursuant to the discussion above. (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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Administrative Director (AD) Rule 41.5 outlines what constitutes a conflict of interest for a medical evaluator. This Rule applies to both AMEs and QMEs. As relevant to this matter, AD Rule 41.5 provides as follows:

(b) A conflict with the duties of an evaluator as used in Labor Code section 139.2(o) means having a disqualifying conflict of interest with one or more of the persons or entities described in subdivision (c) and failing to disclose the fact of the conflict.

(c) The persons or entities with whom a disqualifying conflict of interest can exist are:

- (1) The injured worker, or his or her attorney;
- (2) The employer, or the employer's attorney;
- (3) The claims adjuster or insurer or third party administrator, or their attorney, respectively;
- (4) Any primary treating physician or secondary physician for the employee, if the treatment provided by that physician is disputed in the case;
- (5) The utilization review physician reviewer or expert reviewer, or utilization review organization, only if the opinion of that reviewer or that utilization review organization is disputed in the case;
- (6) The surgical center in which the injured worker had, or is proposed to be used to have, surgery, only if the need for surgery is disputed in the case.
- (7) Other purveyor of medical goods or medical services, only if the medical necessity for using such goods or services is in dispute in the case.

(d) “Disqualifying Conflict of Interest” means the evaluator has any of the following relationships or interests with a person or entity listed in subdivision 41.5(c):

...

(3) A professional affiliation which means the evaluator performs services in the same medical group or other business entity comprised of medical evaluators who specialize in workers’ compensation medical - legal evaluations;

(4) Any other relationship or interest not addressed by subdivisions (d)(1) through (d)(3) which would cause a person aware of the facts to reasonably entertain a doubt that the evaluator would be able to act with integrity and impartiality.

(e) An Agreed Medical Evaluator or a Qualified Medical Evaluator may disqualify himself or herself on the basis of a conflict of interest pursuant to this section whenever the evaluator has a relationship with a person or entity in a specific case, including doctor-patient, familial, financial or professional, that causes the evaluator to decide it would be unethical to perform a comprehensive medical-legal evaluation examination or to write a report in the case.

(Cal. Code Regs., tit. 8, § 41.5(b), (d)(3)-(4) and (e).)²

As the moving party, applicant has the burden of proof to show by a preponderance of the evidence that Dr. Gilberg has a disqualifying conflict of interest precluding him from acting as the AME in this matter per AD Rule 41.5. (Lab. Code, §§ 3202.5, 5705.) We agree with the WCJ that applicant has not met this burden.

Applicant contends that Dr. Gilberg has a disqualifying conflict of interest based on his relationship with applicant’s employer, Cedars-Sinai. The sole evidence presented at trial was Dr. Gilberg’s March 18, 2020 letter responding to applicant’s inquiry regarding his relationship with Cedars-Sinai. Dr. Gilberg reported that he receives no financial remuneration from the hospital for doing rounds and does not accept network referrals from the hospital. The evidence consequently does not reflect that Dr. Gilberg has a financial relationship with or interest in applicant’s employer since he apparently does not receive compensation, referrals or any other

² Section 139.2(o) referenced in AD Rule 41.5(b) states:

An evaluator shall not request or accept any compensation or other thing of value from any source that does or could create a conflict with his or her duties as an evaluator under this code. The administrative director, after consultation with the Commission on Health and Safety and Workers’ Compensation, shall adopt regulations to implement this subdivision.

(Lab. Code, § 139.2(o).)

thing of value from the employer. Dr. Gilberg does not perform services for Cedars-Sinai as part of “the same medical group or other business entity comprised of medical evaluators” under AD Rule 41.5(d)(3). We are unpersuaded that the facts in this matter would cause a person to reasonably entertain doubts as to Dr. Gilberg’s ability to act with integrity and impartiality as the AME.

Applicant contends that Dr. Gilberg must be struck due to his failure to disclose an alleged conflict of interest pursuant to AD Rule 41.5(b). However, this contention presupposes an actual conflict of interest by the medical evaluator with a person or entity involved in the matter. As discussed above, the evidence does not support a finding that Dr. Gilberg has a conflict of interest and therefore, he was not obligated to disclose a conflict that does not exist.

Based on the limited evidentiary record, applicant has not sustained his burden of proof to show that Dr. Gilberg has a disqualifying conflict of interest under AD Rule 41.5 such that he must be struck as the AME.

Therefore, we will deny applicant’s Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on January 28, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 9, 2021

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

**LAW OFFICE OF SAAM AHMADINIA
LAW OFFICE OF TIMOTHY KAFTEN
VLADIMIR NAJARRO**

AI/pc

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