

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

**ANGELICA ROSAS VEGA, *Applicant***

**vs.**

**BEST WESTERN PLUS STEVENSON MANOR (ESG PERSONNEL LEASING);  
SECURITY NATIONAL INSURANCE COMPANY, ADMIN. BY AMTRUST, *Defendants***

**Adjudication Number: ADJ12419865  
San Francisco District Office**

**OPINION AND ORDER  
DISMISSING PETITION FOR  
RECONSIDERATION AND  
DENYING PETITION FOR REMOVAL**

Defendant Best Western Plus Stevenson Manor/ESG Personnel Leasing, insured by Security National Insurance Company, administered by Amtrust (defendant) seeks reconsideration of the Order Taking Off Calendar issued by the Workers' Compensation Administrative Law Judge (WCJ) on November 2, 2021 and the Order Re: Additional QME Panels issued on November 3, 2021.

Defendant contends that there has not been a showing of good cause for additional panels, and that the issue has previously been determined adversely to the applicant.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending dismissal of defendant's petition for reconsideration because the order taking the matter off calendar is not a final order subject to reconsideration, and because there is otherwise good cause to develop the record.

We have reviewed the record and considered the allegations of the petition, and the contents of the WCJ's Report. Based on our review of the record and for the reasons explained in the WCJ's Report and below, we will dismiss the petition for reconsideration, treat the petition as a petition for removal, and deny removal for no showing of significant prejudice or irreparable harm.

## FACTS

Applicant claimed injury to the right shoulder, right wrist, psyche, internal systems, arms, spine, legs, appetite, cognitive [function], gastritis, bathroom functions, headaches, migraines, vision, smell, and taste while employed as a housekeeper by defendant from May 26, 2017 to May 26, 2018. Defendant admits injury to the right wrist but disputes injury to all other body parts. (Amended Petition for Reconsideration, dated March 18, 2022, at 2:10.)

The parties selected Moses Jacob, D.C., as the Agreed Medical Evaluator (AME), who issued an initial report dated November 14, 2019, and a second report of March 27, 2020.

On February 24, 2021, the parties appeared at a mandatory settlement conference, and the WCJ issued an order taking the matter off calendar. The minutes do not contain any notes by the WCJ.

The parties proceeded to trial on November 2, 2021. Before the trial commenced, applicant offered a motion to take the matter off calendar for further discovery in the form of additional Qualified Medical Evaluations (QMEs) in gastroenterology and psychology. (Minutes of Hearing and Order Taking Off Calendar, dated November 2, 2021, at 2:46.) Defendant objected to the motion. The parties stipulated to the following procedural timeline:

On November 13, 2019, applicant sent a letter to the Agreed Medical Examiner, Dr. Jacob, requesting that he address issues including mental health, headaches, gastritis, bathroom functions, smell, taste, and various other issues. In his report dated March 27, 2020, Dr. Jacob deferred the internal medicine GI issues and any cognitive psychological or psychiatric issues to the appropriate specialties recommending that applicant obtain Panel QMEs in the necessary specialties.

On November 4, 2020, applicant's counsel submitted to the Medical Unit a request for additional panels in internal medicine, dentistry, and psychology. Also on November 4, 2020, applicant's counsel filed a Declaration of Readiness on issues including treatment and discovery.

Defendants objected to that DOR on November 11, 2020 stating, among other things, that it was unclear what issues were being alleged.

On December 3, 2020, the Medical Unit denied applicant's request for additional panels stating that the existence of a medical dispute was unclear.

On January 19, 2021, applicant's counsel indicating that applicant was requesting orders filed a DOR for panels in psychology and internal medicine gastroenterology.

On February 2, 2021, defendants objected to applicant's DOR asserting that applicant had filed the DOR to block defendant from moving forward with their own DOR.

Mandatory Settlement Conference went forward before Judge Casey on February 24, 2021, and was taken off calendar as a joint request of the parties. No other notes were made on the Minutes of Hearing.

Also, on February 24, 2021, applicant's counsel sent an email to defendant with the subject line PSY and MMG panels. The email had reports of Dr. Jacob and Dr. Razi attached, but otherwise no content.

On March 18, 2021, defendants filed a DOR for a Mandatory Settlement Conference on issues including permanent disability, AOE/COE, future medical care, settlement, and other issues.

On March 22, 2021, applicant objected to defendant's DOR stating ongoing discovery including additional panels requested.

On April 6, 2021, applicant sent another email to defendant again with the subject line PSY and MMG panels. The email again attached reports of Dr. Jacob and Dr. Razi, but there was no content beyond that.

On April 6, 2021, a Mandatory Settlement Conference went forward, as stated above, and the matter was set for trial at that time on issues including panel specialties. (*Id.*, at 3:3.)

Defendant objected to the motion to go off calendar, asserting a lack of due diligence on the part of applicant, and the closure of discovery per Labor Code section 5502.<sup>1</sup> (*Id.* at 6:18.) Defendant further noted a prior hearing of February 24, 2021 set on the issue of the alleged need for additional panels. Defendant averred that the matter was ordered off calendar without any additional panels issuing. However, the WCJ clarified that no finding or order issued from the February 24, 2021 hearing. After weighing the arguments advanced by the parties, the WCJ determined there to be

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

good cause for the matter to go off calendar for further discovery and for the issuance of additional panels:

I am further persuaded that prior to defendant's filing of the Declaration of Readiness that culminated in today's trial, applicant made efforts including requesting the AME to address the need for additional specialties, requesting a panel, filing a Declaration of Readiness on the issue of additional panels, and reaching out to defendants via email regarding additional panels as well as objecting to defendant's Declaration of Readiness to Proceed and raising the issue of additional panels on the Pre-trial Conference Statement. Accordingly, pursuant to the *McDuffie* case previously cited, I find that the request requires further development in the form of Panel QMEs in the additional specialties of internal medicine gastroenterology and psychology, as stated by the Agreed Medical Examiner, Dr. Moses Jacob, in his March 27, 2020 report. I will separately issue an order for the issuance of additional panels in those specialties. I therefore order that the matter go off calendar for further development of the record accordingly. DISPOSITION: The matter is ORDERED OFF CALENDAR for further development of the record. (*Id.* at 7:12.)

The WCJ also issued a separate Findings and Order re Additional QME Panels, directing the DWC Medical Unit to issue additional panels in psychology and internal medicine-gastroenterology.

On November 24, 2021, defendant filed a Petition for Reconsideration (Petition) of the November 2, 2021 Order taking the matter off calendar. Therein, defendant provided a procedural and medical-legal timeline of events, and reiterated its arguments advanced at the hearing. (Petition, dated November 24, 2021, at 6:26.) Defendant further averred the issue of applicant's entitlement to additional panels was "previously litigated." (*Id.* at 2:7.)

On December 6, 2021, the WCJ rescinded "the order dated November 5, 2021 taking this matter off calendar." The WCJ did not rescind the November 2, 2021 order for the issuance of additional panels of QMEs.

The matter was set for status conference on March 3, 2022, at which time the WCJ heard arguments relevant to the issue of whether the need for additional panels had previously been "litigated." After determining that the issue had been "discussed" but not "litigated" at prior hearings, the WCJ took the matter under submission with the parties allowed time to file briefing responsive to the issue of whether the matter should remain off calendar for further discovery or reset for trial. (March 3, 2022 Minutes of Status Conference, at 3:18.)

On March 18, 2022, defendant filed an “Amended Petition for Reconsideration” (Petition) clarifying defendant’s recitation of the procedural history, specifically that the need for additional panels had previously been “discussed” at hearing, but not “litigated.” (Petition, at 2:4.) Defendant asserted the AME had opined that there was no need for additional panels QMEs, and that the order for additional panels of QMEs was unwarranted. (Id, at 5:24.) The defendant requested the November 2, 2021 Minutes of Hearing and Order Taking Matter Off Calendar be “reconsidered” and that the order for additional panels be rescinded. (Id. at 8:19.)

## DISCUSSION

Initially, we observe that the defendant’s Petition of March 18, 2022 purports to amend the timely filed November 24, 2021 Petition for Reconsideration, filed in response to the November 2, 2021 Order taking the matter off calendar. The WCJ subsequently rescinded the order taking the matter off calendar on December 6, 2021 and returned the matter to status conference. However, we observe that in addition to rescission of the order taking the matter off calendar, defendant’s Petition specifically sought rescission of the *order for additional panels*, which was not rescinded in the WCJ’s order of December 6, 2021. (Petition, at 6:26.) Thus, while defendant sought relief from both orders, the WCJ’s order of rescission addressed only the Order taking the matter off calendar, leaving the Order for additional panels in full force and effect.<sup>2</sup>

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493] (“Shipley”) the Court of Appeal determined that where the Workers’ Compensation Appeals Board (WCAB) fails to timely act on a petition for reconsideration due to no fault of the petitioner, due process requires that the Board consider the petition on the merits, rather than deny it by operation of law under Labor Code section 5909. Here, the WCJ did not rescind the Order for additional panels. Through no fault of defendant the WCAB did not take timely action on defendant’s petition. Accordingly, and pursuant to *Shipley*, we will address the November 24, 2021 Petition, including its March 18, 2022 amendment, on the merits. (*Shipley, supra*, at 1107; Labor Code § 5900, 5903; Cal. Code Regs., tit. 8, § 10955(a).)

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<sup>2</sup> We note that WCAB Rule 10961 provides, “Within 15 days of the timely filing of a petition for reconsideration, a workers' compensation judge shall perform one of the following actions...(b) Rescind the *entire* order, decision or award and initiate further proceedings within 30 days.” (Cal. Code Regs., tit. 8, § 10961 (emphasis added).) Here, rescission of the *entire* order should have encompassed both the order taking the matter off calendar, as well as the order for additional panels.

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Id.* at p. 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Interim orders such as intermediate discovery, or orders to develop the record, are not final orders subject to reconsideration under sections 5900 and 5903. (*Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122]; *Elshami v. C&A Restaurants, Inc.* (October 18, 2019, ADJ11225851) [2019 Cal. Wrk. Comp. P.D. LEXIS 390].)

Here, the WCJ’s Order taking the matter off calendar for further discovery solely resolves an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Similarly, the Order for additional panels of QMEs is an interlocutory order that does not determine substantive rights of the parties or threshold issues. Accordingly, neither order is a “final” decision, and the Petition will be dismissed to the extent it seeks reconsideration of those orders.

We will also deny the petition to the extent it seeks removal. 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 substantial 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).) Here, for the reasons stated in the WCJ's report, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

Defendant contends that the chiropractic AME has foreclosed the need for additional QMEs in other specialties. (Petition, at 5:24.) Defendant asserts the AME has determined "there are no other body regions or medical conditions identified which as a result of the work related injury of May 26, 2018, which [sic] require additional qualified medical examinations." (*Ibid.*) However, as the WCJ notes in the Report, the AME also stated in *the same report* that "other identified or disputed conditions, including internal medicine GI [are] directed to the appropriate specialist, similarly any cognitive issues are directed to the appropriate psychiatrist or psychologist." (Report, at p. 3.) Additionally, we note that the parties stipulated to the procedural and medical-legal history of the case as set forth by the WCJ in the November 2, 2021 hearing:

In his report dated March 27, 2020, Dr. Jacob deferred the internal medicine GI issues and any cognitive psychological or psychiatric issues to the appropriate specialties recommending that applicant obtain Panel QMEs in the necessary specialties. (November 2, 2021 Minutes of Hearing, 3:18.)

Accordingly, we agree with the WCJ that the AME has endorsed the need for evaluations in specialties outside of chiropractic medicine with the appropriate specialist.

The Petition also contends that because applicant sought a hearing on the need for additional panels, and that the resulting February 24, 2021 hearing did not result in the issuance of any panel orders, the issue has been previously resolved adversely to applicant. (Petition, at 8:2.) However, we agree with the WCJ's determination that no actual findings or orders on the QME issue were made at the February 24, 2021 hearing, and we further agree that applicant has been diligent in seeking the issuance of additional panels. (Report, at p. 3.)

Thus, defendant has not alleged or demonstrated that the November 2, 2021 Finding and Order for Additional QME Panels results in substantial prejudice or irreparable harm or that reconsideration from a final adverse decision or order will not be an adequate remedy. (Cal. Code Regs., tit. 8, § 10955(a).) We will deny removal, accordingly.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Finding and Order re Additional QME Panels issued by the WCJ on November 2, 2021 is **DISMISSED**, and the Petition for Removal is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



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

**May 17, 2022**

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

**ANGELICA ROSAS VEGA  
LAW OFFICE OF KENNETH MARTINSON  
LLARENA, MURDOCK, LOPEZ & AZIZAD**

**SAR/abs**

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