

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

**LON MARTINSEN, *Applicant***

**vs.**

**H&H ENTERPRISES, INC.; ZENITH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ7436343**  
**Santa Rosa 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 seeks removal or in the alternative reconsideration of the Findings, Award and Orders (FA&O) issued by the workers' compensation administrative law judge (WCJ) on August 24, 2020. By the FA&O, the WCJ found that the panel qualified medical evaluator's (QME) office engaged in ex parte communication with applicant's attorney's office in violation of Labor Code<sup>1</sup> section 4062.3. (Lab. Code, § 4062.3.) The QME's reports were ordered inadmissible and stricken from the record. The QME was removed from the case and the Medical Unit was ordered to issue a new QME panel in psychology. Discovery was ordered reopened on all issues.

Applicant contends that the QME did not engage in ex parte communication with his attorney and that the contact between the offices was insignificant and inconsequential. Applicant further contends that starting over with a new QME is a severe repercussion and that discovery should not be reopened all issues.

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

We have considered the allegations of applicant's Petition for Removal/Reconsideration, 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 rescind the FA&O and return this matter to the trial level for further proceedings consistent with this opinion.

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

## **FACTUAL BACKGROUND**

Applicant claims injury to the right hand and psyche on April 5, 2010 while employed by H&H Enterprises.

The matter proceeded to trial over several dates. The issues in dispute were identified as follows:

1. Whether or not Dr. Madrid should be replaced as panel QME for violation of Labor Code section 4062.3.
2. Whether or not Dr. Madrid should be replaced for violation of Board Rule 41.5.

(Minutes of Hearing and Summary of Evidence, May 28, 2020, p. 2.)

Defendant's exhibits included Exhibit GG, identified as "Defendant's subpoenaed records of Anthony Madrid, Ph.D. (160 pgs), dated 6/11/2019." (Minutes of Hearing, February 11, 2020, p. 5.) A copy of this exhibit is not identified in the Electronic Adjudication Management System (EAMS).

The WCJ issued the resulting FA&O as outlined above.

## **DISCUSSION**

### I.

Applicant sought reconsideration or in the alternative removal of the FA&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. 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.

## II.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, at p. 475.)

The exhibits admitted into evidence at trial reportedly included subpoenaed records from the QME Dr. Madrid as one of defendant's exhibits (Exhibit GG). However, this exhibit has not been identified in EAMS and does not appear to have been filed as part of creation of the record. It is unclear why defendant did not ensure the record contained all of its proffered exhibits. In the absence of a proper and complete record, we are unable to determine whether the WCJ's decision is supported by substantial evidence.

Upon return of this matter to the trial level, we recommend the trier of fact create a complete evidentiary record regarding this dispute and issue a new decision. Either party may then seek reconsideration of that decision.

Therefore, we will rescind the FA&O and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Orders issued by the WCJ on August 24, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2022

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

**COLEMAN CHAVEZ & ASSOCIATES  
LAW OFFICE OF JOHN BLOOM  
LON MARTINSEN**

AI/pc

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