

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. RIV 0069499**

4 **KATHY WARD,**

5 *Applicant,*

6 **vs.**

7 **CITY OF DESERT HOT SPRINGS;**
8 **permissibly self-insured and administered by**
9 **HAZELRIGG RISK MANAGEMENT**
10 **SERVICES,**

11 *Defendant.*

12 **OPINION AND DECISION**
13 **AFTER RECONSIDERATION**
14 **AND ORDER DENYING**
15 **REMOVAL**

16 On July 31, 2006, we granted defendant's petition for reconsideration or, in the alternative,
17 petition for removal of the Findings and Order of May 5, 2006, wherein the workers'
18 compensation administrative law judge (WCJ) found, in relevant part: (1) that applicant claims to
19 have sustained industrial injury to her psyche and in the form of various internal conditions from
20 June 8, 2000, through June 8, 2005, while employed by defendant as a development services
21 manager; and (2) that medical reports regarding the compensability of applicant's psychiatric
22 and internal injury claims must be obtained through the procedures established by Labor Code
23 sections 4060 and 4062.2; therefore, defendant is not entitled to obtain a medical evaluation of
24 applicant pursuant to Labor Code section 4064(d).¹

25 Defendant contends that it is entitled to a medical evaluation of applicant under section
26 4064(d), arguing that the amendments to section 4060, together with the enactment of section
27 4062.2, did not eliminate the right of either party to obtain at its own expense an admissible
28 medical report from an evaluation obtained pursuant to section 4064(d). Applicant did not file an
29 answer to defendant's petition, however, the WCJ prepared a Report and Recommendation
30 (Report) suggesting that defendant's petition be dismissed, to the extent it seeks reconsideration,

¹ All further statutory references are to the Labor Code.

1 and that it be denied, to the extent it seeks removal.

2 For the reasons set forth in the WCJ's Report, which we adopt and incorporate by
3 reference, and for the following reasons, we hold that for claimed industrial injuries occurring on
4 or after January 1, 2005, in which the employee is represented by an attorney: (1) pursuant to
5 section 4060(c), medical disputes regarding the compensability of the alleged industrial injury
6 must be resolved solely by the procedure provided in section 4062.2; and (2) an evaluation
7 regarding compensability may not be obtained pursuant to section 4064(d) – and, if obtained, it is
8 not admissible.

9 Therefore, the Order of May 5, 2006, properly denied defendant's request to compel
10 applicant's examination pursuant to section 4064(d). Accordingly, we will vacate our Order
11 Granting Reconsideration of July 31, 2006, dismiss defendant's petition for reconsideration, as the
12 disputed order is not a final order from which reconsideration may properly be sought, and deny
13 removal.

14 **Background**

15 Applicant claims to have sustained cumulative psychiatric and internal injury while
16 employed as a development services manager by defendant from June 8, 2000, through June 8,
17 2005.

18 Defendant denied liability for the alleged industrial injury. On or about November 4, 2005,
19 defendant arranged for applicant to be examined by Stuart Meisner, Ph.D. Applicant, through her
20 counsel, refused to be examined by Dr. Meisner, asserting that the examination was impermissible
21 pursuant to sections 4060 and 4062.2. Defendant sought to compel applicant's examination with
22 Dr. Meisner and, on April 25, 2006, the parties proceeded to trial regarding the issue of whether
23 defendant is entitled to obtain, and therefore compel, applicant's medical evaluation pursuant to
24 section 4064(d).

25 On May 5, 2006, the WCJ issued the Findings and Order of which defendant sought
26 reconsideration or, in the alternative, from which it seeks removal. In the Opinion on Decision,
27 the WCJ explained, in relevant part, that, in cases in which the worker is represented, section 4060

1 allows an examination regarding the compensability of an alleged injury occurring on or after
2 January 1, 2005, to be obtained only by the procedure set forth in section 4062.2 and that
3 defendant “cannot circumvent” section 4060 and section 4062.2 by scheduling an examination
4 pursuant to section 4064(d).

5 Discussion

6 Section 4060 applies to “disputes over the compensability of any injury.” Subsection (c) of
7 section 4060, as amended pursuant to Senate Bill (SB) 899 (Stats. 2004, ch. 34, § 34), provides as
8 follows:

9 “If a medical evaluation is required to determine compensability at
10 any time after the filing of the claim form, and the employee is
11 represented by an attorney, a medical evaluation to determine
12 compensability *shall be obtained only by the procedure provided
13 in Section 4062.2.*” (Italics added.)

14 In turn, section 4062.2(a), as adopted by SB 899 (Stats. 2004, ch. 34, § 18), provides as
15 follows:

16 “Whenever a comprehensive medical evaluation is required to
17 resolve any dispute arising out of an injury or a claimed injury
18 occurring on or after January 1, 2005, and the employee is
19 represented by an attorney, the evaluation *shall be obtained only
20 as provided in this section.*” (Italics added.)

21 Section 4062.2 then goes on to provide that, in represented cases involving injuries on or after
22 January 1, 2005, the parties shall either select an agreed medical examiner (AME) or select a
23 qualified medical examiner (QME) from a three-member panel.

24 Accordingly, because sections 4060(c) and 4062.2(a) state that medical evaluations “shall
25 be obtained only” by the procedure they specify, it appears the Legislature intended that this
26 procedure be the exclusive method for obtaining medical evaluations on compensability. In this
27 regard, we observe that “shall” is mandatory language. (Lab. Code, § 15; see also, *Smith v.*
Rae-Venter Law Group (2003) 29 Cal.4th 345, 357; *Jones v. Tracy School Dist.* (1980) 27 Cal.3d
99, 109; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907 [42 Cal. Comp. Cases 131].)
Moreover, in the context of sections 4060(c) and 4062.2(a), the word “only” denotes a restriction

1 or limitation. (See Funk & Wagnalls Standard College Dictionary (1974), p. 944 (defining “only”
2 to mean “[i]n one manner” and “[s]olely; exclusively”).)

3 Section 4064(d), provides in relevant part:

4 “[N]o party is prohibited from obtaining any medical evaluation or
5 consultation at the party’s own expense. In no event shall an
6 employer or employee be liable for an evaluation obtained in
7 violation of subdivision (b) of Section 4060. All comprehensive
8 medical evaluations obtained by any party shall be admissible in
any proceeding before the appeals board except as provided in
subdivisions (d) and (m) of Section 4061 and subdivisions (b) and
(e) of Section 4062.”

9 Prior to its amendment by SB 899, former section 4060(c) also allowed any party to
10 “obtain additional reports at their own expense.” However, that provision was deleted from
11 section 4060(c) by SB 899 and was replaced with the current reference to the procedure requiring,
12 in cases involving a represented employee, that “a medical evaluation to determine compensability
13 shall be obtained only by the procedure provided in Section 4062.2.”

14 However, section 4064 was not amended by SB 899. Thus, if there is an irreconcilable
15 conflict between section 4064(d), on the one hand, and sections 4060 and 4062.2, on the other,
16 then the latter statutes prevail as the more recently amended and enacted. (Cf. *Collection Bureau of*
17 *San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310; *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16
18 Cal.3d 1, 7 [41 Cal.Comp.Cases 42]; *Graham v. Workers’ Comp. Appeals Bd.* (1989) 210
19 Cal.App.3d 499, 505 [54 Cal.Comp.Cases 160].) Here, the language of section 4064(d), allowing
20 a party to obtain a medical evaluation or consultation at its own expense, cannot be harmonized
21 either with SB 899’s deletion of the language of former section 4060(c), which had permitted
22 parties to obtain a additional examinations at their own expense, or with SB 899’s inclusion of
23 language in current sections 4060(c) and 4062.2(d) that medical evaluations “shall be obtained
24 only” by the procedure they specify. Accordingly, sections 4060(c) and 4062.2(d), as the most
25 recently enacted or amended statutes, control over section 4064(d).

26 ///

27 Moreover, an interpretation that section 4064(d) cannot be used to circumvent the

1 QME/AME procedures of sections 4060(c) and 4062.2(a) is consistent with recent Court of
2 Appeal decisions rejecting other attempts to circumvent the former QME/AME statutes. (*Nunez v.*
3 *Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584, 594 [71 Cal.Comp.Cases 161] (section
4 4050 may not be used to circumvent former section 4060 et seq.); *Cortez v. Workers' Comp.*
5 *Appeals Bd.* (2006) 136 Cal.App.4th 596 [71 Cal.Comp.Cases 155] (neither section 4050 nor
6 section 5701 may be used to circumvent former section 4060 et seq.); see also, *Regents of the*
7 *Univ. of Cal. v. Workers' Comp. Appeals Bd. (Ford)* (1995) 60 Cal.Comp.Cases 1246 (writ den.).)

8 Therefore, for claimed industrial injuries occurring on or after January 1, 2005, in which
9 the worker is represented by an attorney, we hold that disputes regarding the compensability of the
10 alleged industrial injury must be resolved, pursuant to section 4060(c), by the procedure provided
11 in section 4062.2 and that an evaluation regarding compensability may not be obtained pursuant to
12 section 4064 – and, if a report is obtained, it is not admissible.

13 Consistent with this holding, we conclude that the WCJ's Order denying defendant's
14 request to compel applicant to undergo a medical evaluation pursuant to section 4064(d) was
15 proper. A defendant cannot compel an applicant to attend a medical evaluation that would violate
16 the provisions of sections 4060(c) and 4062.2 and that would generate an inadmissible medical
17 report. (Cf. *Cortez v. Workers' Comp. Appeals Bd.*, *supra*, 136 Cal.App.4th at p. 602 [71
18 Cal.Comp.Cases at p. 160].)

19 Accordingly, we will vacate our prior Order Granting Reconsideration and dismiss
20 defendant's petition for reconsideration, as the Order of May 5, 2006, is not a final order. (Lab.
21 Code, § 5900; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65
22 Cal.Comp.Cases 650]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104
23 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp.*
24 *Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661].) Moreover, we will
25 deny defendant's alternative request for removal, as the WCJ properly resolved the apparent
26 conflict between sections 4060, 4062.2, and 4064.

27 For the foregoing reasons,

1 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
2 Appeals Board, that the Order Granting Reconsideration of July 31, 2006, is hereby **VACATED**.

3 **IT IS FURTHER ORDERED** that defendant's petition for reconsideration of the
4 Findings and Order of May 5, 2006, is hereby **DISMISSED**.

5 **IT IS FURTHER ORDERED** that defendant's petition for removal from the Findings
6 and Order of May 5, 2006, is hereby **DENIED**.

7 ***WORKERS' COMPENSATION APPEALS BOARD***

8
9
10 */s/ James C. Cuneo*

11 ***I CONCUR.***

12
13 */s/ Merle C. Rabine*

14
15
16 */s/ Ronnie G. Caplane*

17
18
19 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

20 ***9/25/06***
21 ***SERVICE BY MAIL ON ALL PARTIES AS SHOWN BELOW:***

22 ***D. MICHAEL CARUTHERS, 431 S. PALM CANYON DR., #204, PALM SPRINGS, CA 92264***
23 ***ZAKS & BARNARD, 2596 MISSION ST., #200, SAN MARINO, CA 91108***

24
25 ***JSG/tab***
26
27