WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VICTOR BONNEVIE, *Applicant*

vs.

FOX STUDIO LOT, permissibly self-insured, administered by GALLAGHER BASSETT, *Defendants*

Adjudication Numbers: ADJ12994854, ADJ12994855
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR REMOVAL

We have considered the allegations of applicant's Petition for Removal, defendant's answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, the WCJ's analysis of the merits of applicant's arguments in the WCJ's report and for the reasons discussed below, we will deny 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, 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).) Here, based upon the WCJ's analysis of the merits of applicant's arguments, 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 applicant.

With respect to the dissent, section 4062.2(f) provides as follows in relevant part: "A panel shall not be requested pursuant to subdivision (b) **on any issue that has been agreed to be submitted to** or has been submitted to an agreed medical evaluator **unless the agreement has been canceled by mutual written consent**." (Lab. Code, § 4062.2(f), emphasis added.) An agreement to an AME may be canceled by mutual written consent. Here, only applicant wishes to withdraw from the agreement so there is no mutual consent between the parties to cancel the AME. Moreover, the panel decision in *Yarbrough v. Southern Glazer's Wine and Spirits* (2017) 83 Cal.Comp.Cases 425 [2017 Cal. Wrk. Comp. P.D. LEXIS 508] cited by the dissent ignores the language in section 4062.2(f) that a QME panel shall not be requested "on any issue that has been agreed to be submitted to" an AME. By its plain language, the statute precludes a QME panel request where either: 1) the parties have agreed to submit the issue to an AME **or** 2) the issue **has been** submitted to an AME. (See e.g., *People v. Loeun* (1997) 17 Cal.4th 1, 9-10, citing *White v. County of Sacramento* (1982) 31 Cal.3d 676 [the use of the disjunctive "or" in a statute indicates a legislative intent to designate alternative or separate categories including distinct ways to satisfy statutory requirements].) The panel in *Yarbrough* read this statutory language as permitting unilateral withdrawal from an AME agreement if no evaluation had taken place yet. This interpretation ignores the first part of the statutory subdivision contemplating solely an agreement to submit an issue to an AME, not actual submission of the issue to the AME. We disagree with *Yarbrough* to the extent it suggests a party may unilaterally withdraw from an AME agreement because an evaluation has not yet taken place with the agreed upon physician.[1]

Therefore, we will deny applicant's Petition.

[1] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) We therefore are not bound by the *Yarbrough* panel decision, although we may consider it to the extent that we find its reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) For the reasons discussed herein, we find the reasoning of *Yarbrough* to be unpersuasive.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the Joint Findings and Orders issued by the WCJ on June 18, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I DISSENT. (See Attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 17, 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 JAMES YANG
MANNING & KASS
VICTOR BONNEVIE

AI/*pc*

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. I would grant applicant's Petition, rescind the WCJ's decision and issue a new decision finding that applicant may withdraw from the agreement to the agreed medical evaluator (AME) per *Yarbrough v. Southern Glazer's Wine and Spirits* (2017) 83 Cal.Comp.Cases 425 [2017 Cal. Wrk. Comp. P.D. LEXIS 508]. As stated in *Yarbrough*:

> By its plain language, section 4062.2(f) deals only with withdrawal from an AME after submitting to an AME evaluation. Nothing in section 4062.2(f) precludes a party from withdrawing from an AME before submitting to an AME evaluation.
>
> (*Id.* at p. 428; see also Lab. Code, § 4062.2(f).)

Applicant in this matter wishes to withdraw from the agreement to use Dr. Sabbag as an AME. The record reflects that the parties agreed to use Dr. Sabbag as an AME, but no evaluation with Dr. Sabbag had taken place before applicant withdrew from this agreement. Per the language of section 4062.2(f) and the analysis in *Yarbrough*, applicant should be permitted to withdraw from the agreement to an AME.

Therefore, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 17, 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 JAMES YANG
MANNING & KASS
VICTOR BONNEVIE

AI/*pc*

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