

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

FERNANDO YANES, *Applicant*

vs.

**VALLEY CHILDREN'S HOSPITAL;
SAFETY NATIONAL CASUALTY CORPORATION, *Defendants***

**Adjudication Number: ADJ15870256
Fresno District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks removal from the August 24, 2022 Amended Findings of Fact and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a respiratory therapist on October 24, 2021, sustained industrial injury to left knee. The WCJ found, in relevant part, that applicant's QME panel was invalid, and that the parties were required to start the panel QME selection process anew.

Applicant contends that he appropriately exercised his right to obtain a new panel of QMEs after obtaining legal representation, when he had not received a QME evaluation arising out of a prior panel that issued while applicant was unrepresented.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, and applying the removal standard, affirm the F&O, except that we will substitute new Findings of Fact that QME Panel No. 2389682 is valid, and rescind the order that the parties obtain a new panel of QMEs.

FACTS

Applicant claimed injury to his left knee while employed as a respiratory therapist by defendant Valley Children's Hospital on October 24, 2021. Defendant admits injury arising out of and in the course of employment, but contests the nature and extent of the injury.

On January 20, 2022, the unrepresented applicant requested a panel of orthopedic Qualified Medical Evaluators, pursuant to Labor Code section 4062.1.

On January 27, 2022, the Division of Workers' Compensation (DWC) Medical Unit issued panel no. 2802519. (Ex. C, Qualified Medical Evaluator Panel, dated January 27, 2022.)

On March 3, 2022, applicant retained legal counsel.

On March 7, 2022, applicant's counsel requested a replacement panel in the specialty of chiropractic medicine. (Ex. D, letter from Applicant's Counsel to DWC Medical Unit, dated March 7, 2022.)

On March 21, 2022, the DWC Medical Unit issued QME panel no. 2839682, in the specialty of chiropractic medicine.

On March 31, 2022, defendant objected to panel no. 2389682 on the grounds that the panel request letter was procedurally deficient.

On April 13, 2022, the parties proceeded to trial on issues of the validity of the March 7, 2022 Replacement Panel Request pursuant to Labor Code Section 4062.2 and *Romero v. Costco Wholesale* (2007) 72 Cal.Comp.Cases 824 [2007 Cal. Wrk. Comp. LEXIS 168] (*Romero*), and whether the defendant was entitled to a new panel in orthopedic surgery, and whether substantial justice required the parties to restart the panel QME process under section 4062.2.¹

On August 24, 2022, the WCJ issued the F&O, invalidating panel 2839682, determining that defendant was not entitled to a new panel of QMEs in orthopedic surgery, and directing the parties to obtain a new panel of QMEs pursuant to section 4062.2.

Applicant's Petition for Removal (Petition) avers that the WCJ's decision is inconsistent with the significant panel decision in *Romero*, and our subsequent jurisprudence applying *Romero*. Applicant asserts that under *Romero*, the parties are not required to "start all over and submit a new objection letter to that which has already been objected to in the first place when the original unrepresented Panel was requested." (Petition, at 5:2.) Applicant avers he was entitled to obtain a

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

new panel of QMEs after obtaining legal representation because the “evaluation” process described in section 4062.2(a) is separate and distinct from the process for obtaining a panel.

Defendant’s Answer avers that *Romero* and the subsequent panel decisions cited by applicant “do not specifically address the procedural requirements for obtaining a new panel under *Romero* and in compliance with the provision set forth in Labor Code §4062.2(b).” (Answer, at 6:6.)

The WCJ’s report notes that to the extent that the parties failed to comply with the procedural requirements set forth in section 4062.2(b), any ensuing requests for QME panels were procedurally invalid and void. (Report, at p. 3.)

DISCUSSION

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 [210 Cal. Rptr. 3d 101, 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, *inter alia*, findings of injury AOE/COE and employment. Injury AOE/COE and employment are threshold issues fundamental to the claim for

benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice" (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [9 Cal. Rptr. 2d 345, 57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shiple*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shiple, supra*, 7 Cal.App.4th at p. 1108.) Applicant's Petition was timely filed on September 14, 2022. Our failure to act was due to a procedural error and our time to act on the Petition was tolled.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory finding/order in the decision regarding whether applicant obtained a valid panel of QMEs after he obtained legal representation. (Lab. Code, §§ 4061, 4062.) Therefore, the removal standard applies to our review. (See *Gaona, supra*.)

The pertinent facts are not in dispute. The parties, while applicant was unrepresented, identified a medical dispute, and initiated the QME evaluation process. Defendant's January 3, 2022 letter to applicant noted that that defendant accepted liability for the left knee only, and that "[I]ability is being denied for left knee ACL findings and need for surgery because Dr. Bianchi's 12/15/2021 report notes the problems associated with the ACL and need for surgery did not arise out of the reported work incident." (Ex. B, Notice of Partial Denial of Claim for Workers' Compensation Benefits, dated January 3, 2022, p. 1.)

Once the parties have identified a medical dispute, the procedure for obtaining a panel of QMEs where applicant is not represented is governed by section 4062.1, which provides in pertinent part:

(b) If either party requests a medical evaluation pursuant to Section 4060, 4061, or 4062, either party may submit the form prescribed by the administrative director requesting the medical director to assign a panel of three qualified medical evaluators in accordance with Section 139.2. However, the employer may not submit the form unless the employee has not submitted the form within 10 days after the employer has furnished the form to the employee and requested the employee to submit the form. The party submitting the request form shall designate the specialty of the physicians that will be assigned to the panel.

(c) Within 10 days of the issuance of a panel of qualified medical evaluators, the employee shall select a physician from the panel to prepare a medical evaluation, the employee shall schedule the appointment, and the employee shall inform the employer of the selection and the appointment. If the employee does not inform the employer of the selection within 10 days of the assignment of a panel of qualified medical evaluators, then the employer may select the physician from the panel to prepare a medical evaluation. If the employee informs the employer of the selection within 10 days of the assignment of the panel but has not made the appointment, or if the employer selects the physician pursuant to this subdivision, then the employer shall arrange the appointment. Upon receipt of written notice of the appointment arrangements from the employee, or upon giving the employee notice of an appointment arranged by the employer, the employer shall furnish payment of estimated travel expense.

Here, the parties satisfied the procedure for obtaining a panel, and the Division of Workers' Compensation (DWC) Medical Unit issued panel no. 2802519. (Lab. Code, §§ 4061, 4062, 4062.1.) The parties do not dispute that this panel was valid when originally issued, and that applicant never attended a QME evaluation with any of the physicians from that panel.

Thereafter, on March 3, 2022, applicant retained legal counsel, and on March 7, 2022, applicant's counsel requested a replacement panel. (Ex. D, letter from Applicant's Counsel to DWC Medical Unit, dated March 7, 2022.) On March 21, 2022, the DWC Medical Unit issued QME panel number 2839682, in the specialty of chiropractic medicine.

In the significant panel decision *Romero*, the unrepresented applicant's treating physician issued a report recommending physical therapy, to which defendant objected.² Pursuant to section 4062, defendant advised applicant in writing of the applicable procedure to resolve the dispute, and when defendant did not receive a response to its objection, it requested and received a QME

² A significant panel decision is a decision of the Appeals Board that has been designated by all members of the Appeals Board as of significant interest and importance to the workers' compensation community. Although not binding precedent, significant panel decisions are intended to augment the body of binding appellate and en banc decisions by providing further guidance to the workers' compensation community. (Cal. Code Regs., tit. 8, § 10305(u).)

panel in orthopedic surgery. Meanwhile, applicant became represented by an attorney, and selected a new treating physician in chiropractic medicine. When the parties were unable to reach an agreement on an AME, defendant scheduled an appointment with the existing panel of QMEs, and applicant requested a new QME panel in chiropractic medicine. We observed that “while applicant was unrepresented, defendant objected to her treating physician’s recommendation for physical therapy and advised applicant in writing of the applicable procedure to resolve the dispute.” (*Id.* at 828.) We also noted, however, that “because applicant had not attended and participated in the examination by the panel QME when she changed from being not represented by an attorney to being represented, she had not ‘received’ a comprehensive medical-legal evaluation pursuant to section 4062.1 and is, therefore, not precluded from requesting a new QME panel pursuant to section 4062.2.” (*Ibid.*)

Similarly, in *City of Tracy v. Workers' Comp. Appeals Bd. (Luckhardt)* (2019) 84 Cal.Comp.Cases 838 [2019 Cal. Wrk. Comp. LEXIS 73] (*Luckhardt*), the parties satisfied the prerequisites to obtaining a QME panel in orthopedic surgery while applicant was unrepresented. Following issuance of the panel, but prior to any QME evaluation, applicant retained counsel. Applicant’s counsel then requested and received a new panel of QMEs in pain management, pursuant to *Romero*. We affirmed the WCJ’s determination that while the parties had completed the process necessary to obtaining a QME while applicant was unrepresented, the applicant had not yet received a comprehensive medical-legal evaluation by a QME, and was thus entitled to a new panel of QMEs under section 4062.2. (*Id.* at 840-841.)

Here, the parties identified a medical dispute while applicant was unrepresented, and invoked the dispute resolution protocol under section 4062.1. Having properly completed the procedural steps necessary to obtaining a panel of QMEs, applicant retained counsel, and requested a new panel. (Lab. Code, §§ 4061, 4062.)

Defendant avers that once applicant obtained legal representation, he was required to comply with the medical-legal dispute resolution process set forth in section 4062.2(b), which applies to represented applicants, and requires either an examination for compensability under section 4060, or an objection under section 4061 or 4062. (Defendant’s Trial Brief, dated April 27, 2022, at 7:26.) Defendant contends that applicant’s March 7, 2022 QME request was procedurally defective because it was not made after requesting a medical evaluation under section 4060, or after offering an objection under sections 4061 or 4062. (Answer, at 6:24.)

However, as was the case in *Romero, supra*, and *Luckhardt, supra*, the parties had previously completed the statutorily prescribed steps necessary to obtaining a panel of QMEs prior to applicant's retaining legal representation. Thus, applicant's request for a new panel of QMEs on March 7, 2022 was made only after the parties had identified the medical dispute that required a QME evaluation, and had taken the appropriate steps to obtain a valid panel of QMEs. The parties were not thereafter required to reinitiate a dispute resolution process that was already underway and had appropriately resulted in the issuance of a prior panel. (Lab. Code, § 4062.2(b); *Romero, supra*, 72 Cal.Comp.Cases 824, 828; *cf. Hazen v. Porterville Unified School District* (2022) 87 Cal. Comp. Cases 932 [2022 Cal. Wrk. Comp. P.D. LEXIS 173] [parties must obtain new panel in accordance with § 4062.2 when prior QME panels obtained under both §§ 4062.1 and 4062.2 were the result of procedurally deficient objections].)

We further note that requiring the parties to repeat the procedural steps necessary to obtaining a panel of QMEs once applicant obtains counsel is inconsistent with our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.)

Accordingly, and applying the removal standard, we are persuaded that the decision of the WCJ to invalidate panel no. 2839682 will result in significant prejudice or irreparable harm. We will therefore grant reconsideration and affirm the F&O, except that we will amend Findings of Fact Number 3 to reflect that panel no. 2839682 was validly obtained, and rescind Orders No. 1 and 2.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Amended Findings of Fact and Order issued by the WCJ on August 24, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 24, 2022 Amended Findings of Fact and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. Applicant's request for a panel of QMEs, lodged March 7, 2022, was procedurally appropriate, and panel no. 2839682 was validly obtained.

ORDERS

1. [Rescinded.]
2. [Rescinded.]

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER



/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 23, 2023

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

**FERNANDO YANES
GROVE LAW OFFICES
LAW OFFICES OF DUNCAN, CASSIO, LUCCHESI, BINKLEY & VAN DOREN**

SAR/abs

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