

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

FRANCELIA DIAZ, *Applicant*

vs.

MEDTRONIC, INC.;

ACE AMERICAN INSURANCE COMPANY, administered by ESIS, Defendants

Adjudication Number: ADJ12180865

Van Nuys District Office

**OPINION AND ORDER
CORRECTING CLERICAL ERROR**

It has come to the Appeals Board's attention that its decision served March 20, 2023 contains a clerical error consisting of the omission of the date of service. The decision served contains a blank space where the date of service should appear.

We correct this clerical error by virtue of this decision without granting reconsideration, as such errors may be corrected without further proceedings at any time. (See 2 *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, March 2019 Update) Supplemental Proceedings, § 23.74, p. 23-76.)

For the foregoing reasons,

IT IS ORDERED that the clerical error consisting of the omission of the date of service set forth in the Appeals Board's Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration to reflect the following date of service: March 20, 2023.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 27, 2023

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

**FRANCELIA DIAZ
LAW FIRM OF ROWEN, GURVEY & WIN
PEARLMAN, BROWN & WAX**

AS/mc

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

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

FRANCELIA DIAZ, *Applicant*

vs.

MEDTRONIC, INC.;
ACE AMERICAN INSURANCE COMPANY, administered by ESIS, *Defendants*

**Adjudication Number: ADJ12180865
Van Nuys District Office**

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

Defendant seeks removal or in the alternative reconsideration of the Amended Opinion on Decision, Findings of Fact and Order (Amended F&O) issued by the workers' compensation administrative law judge (WCJ) on September 1, 2022. In his Amended F&O, as relevant herein, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to various body parts while employed by the defendant as a quality control inspector on September 4, 2013. The WCJ ordered the Medical Unit to issue an additional panel in the specialty of pain management.

Defendant contends that the WCJ erred in ordering an additional panel in pain management.

We received an Answer from Applicant. We received a Report and Recommendation (Report) from the WCJ on the Petition for Reconsideration and Removal recommending that we deny reconsideration and removal.

We have considered the allegations of the Petition for Reconsideration and Removal and the contents of the report of the WCJ with respect thereto. Based on our review of the record, we will grant the Petition for Reconsideration, rescind the Amended F&O, and substitute a new Findings of Fact in its place, which finds that applicant sustained injury AOE/COE to her neck, bilateral elbows, bilateral wrists, bilateral shoulders, and Chronic Regional Pain Syndrome

(CRPS), and that applicant did not show good cause for an additional QME panel in the specialty of pain management.

FACTUAL BACKGROUND

Applicant claims injury on September 4, 2013 to various body parts while employed by the defendant. Applicant's primary treating physicians (PTP) are Gregory Vassilev, M.D., and Jayson Hymes, M.D.

Applicant was evaluated by Panel Qualified Medical Evaluator (QME) Charles Schwartz, M.D., on various occasions. Dr. Schwartz issued several reports as the QME. Dr. Schwartz's medical specialty is orthopedic surgery. (Minutes of Hearing (MOH), July 6, 2022, pp. 2-4.)

In a report dated January 4, 2016, Dr. Schwartz states his diagnostic impression of applicant includes:

1. Cervical spine degenerative disc disease with right upper extremity radiculopathy.
2. Bilateral trapezius/shoulder strain.
3. Chronic regional pain syndrome, right upper extremity.
4. Carpal tunnel syndrome, right wrist.
5. Status post carpal tunnel release, right wrist (8/5/14).

(*Id.* at p. 5.)

In a report dated March 7, 2017, Dr. Schwartz again states the same diagnostic impression including "[c]hronic regional pain syndrome, right upper extremity". (*Id.* at p. 5.)

In a report dated December 3, 2020, Dr. Schwartz again states the same diagnostic impression including "[c]hronic regional pain syndrome, right upper extremity". (*Id.* at p. 5.)

In a report dated May 5, 2021, there is no mention of CRPS. (Defendant's Exhibit I, Medical report of Charles Schwartz, M.D., May 5, 2021.)

In a letter to defendant dated April 25, 2022, applicant's attorney stated, in relevant part:

Notice is hereby given that pursuant to Labor Code § 4062.2, applicant declares a medical dispute with the opinions rendered by Dr. Bailey / Dr. Hymes in a report dated February 14, 2022, received in this office on 04/07/2022. The basis for this dispute is: ...[t]he disability status of the applicant's medical condition.

(Applicant's Exhibit 2, Letter objecting to the report of Dr. Bailey and Dr. Hymes, April 25, 2022, p.1.)

In a letter to defendant dated April 27, 2022, applicant's attorney stated, in relevant part:

Notice is hereby given that pursuant to Labor Code § 4062.2, applicant declares a medical dispute with the opinions rendered by Dr. Robert Sanford in his report dated December 10, 2021, received in this office on 04/26/2022. The basis for this dispute is: ...[c]ausation, apportionment, and/or the existence, nature & extent of permanent disability... ¶ To resolve this dispute, a neutral evaluation will be necessary. Such an evaluation will also be necessary with a specialist in pain medicine in light of our recent objection to Dr. Hymes's reporting. To that end, enclosed herewith please find an additional panel request form for panels in urology and pain medicine. Please execute same and forward to this office for further processing with the Medical Unit.

(Applicant's Exhibit 4, Request for additional panels in urology and pain medicine, April 27, 2022, p. 1-2.)

In its Petition, defendant states it has agreed to utilize additional QME panels for the specialties of urology and psychology.

The parties proceeded to an Expedited Hearing on July 6, 2022. According to the MOH, the stipulations were, in relevant part, that applicant sustained injury to various body parts arising out of and in the course of employment with the defendant, and defendant has furnished some medical treatment. The issues were whether there is good cause to order an additional panel in pain management, and whether there is a disputed medical issue that cannot be addressed by Dr. Schwartz, the current QME in orthopedic surgery.

On August 31, 2022, the WCJ issued his Amended F&O and ordered the Medical Unit to issue an additional panel in pain management.¹

In its Petition, defendant contends that applicant has failed to show good cause that Dr. Schwartz cannot address the outstanding medical issues that applicant is seeking to be addressed (notwithstanding the medical issues in urology and psychology for which, as previously stated, both parties have agreed to utilize additional panels). Defendant asks us to rescind the order for an additional panel in pain management.

Applicant, in her Answer, contends that because she objected to the pain management PTP's February 14, 2022 report, she is entitled to a pain management panel. She further contends that Dr. Schwartz did not address applicant's diagnosis of CRPS in his most recent report and he

¹ On August 26, 2022, the WCJ issued a F&O and found in relevant part that applicant had not shown good cause to warrant issuing an additional panel in pain management. Once the WCJ issued the Amended F&O, the first F&O is presumed to have been rescinded. (See Cal. Code Regs., tit. 8, § 10966.)

therefore is not qualified to report on that medical issue. Applicant further contends that a physician whose specialty is pain management is the proper physician to act as the QME in addressing CRPS.

The WCJ issued a Report and Recommendation (Report) on the Petition for Reconsideration and Removal reiterating his findings from the September 1, 2022 Amended F&O.

DISCUSSION

I.

Labor Code 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 [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.) Defendant’s Petition was timely filed on September 16, 2022. Consequently, our failure to act was due to a procedural error, and we conclude that our time to act on applicant’s Petition was tolled.

II.

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, 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.)² 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, although the decision contains a finding that is final, the petitioner is challenging an interlocutory finding in the decision which is the issue of whether applicant was entitled to the replacement panel. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

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 significant 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, we will grant removal because we are persuaded that petitioner has shown that substantial prejudice or irreparable harm will result if removal is not granted.

III.

Administrative Director (AD) Rule 31.7(b) provides for an additional QME panel in another specialty as follows in relevant part:

- (a) Once an Agreed Medical Evaluator, an Agreed Panel QME, or a panel Qualified Medical Evaluator has issued a comprehensive medical-legal report in a case and a new medical dispute arises, the parties, to the extent possible, shall obtain a follow-up evaluation or a supplemental evaluation from the same evaluator.
- (b) Upon a showing of good cause that a panel of QME physicians in a

² All further statutory references are to the Labor Code unless otherwise stated.

different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means:

•••

(3) An order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based zip code from which to randomly select evaluators . . .

(Cal. Code Regs., tit. 8, § 31.7(a) and (b)(3); see also Cal. Code Regs., tit. 8, § 32.6.)

When a new medical dispute arises, the parties should obtain a follow-up or supplemental evaluation from the same evaluator to the extent possible. (See e.g., *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) An additional QME panel in another specialty is warranted if there is good cause as defined in AD Rule 31.7(b), i.e., as relevant to this matter, if the WCJ orders an additional panel. Section 4062.2 governs the process to obtain a medical-legal evaluation from a panel QME in a represented case if the parties do not agree on an agreed medical evaluator (AME). (Lab. Code, § 4062.2.)

Applicant has pled injury in the form of CRPS. In its Petition, defendant admits that applicant sustained injury in the form of CRPS, and thereby attempts to argue that the parties do not have a dispute. Applicant avers that the parties do have a dispute because she disagrees with her current treating physician's conclusion as to her permanent disability. However, the preliminary issue which must first be addressed is whether the current QMEs have adequately opined on the issues and whether such opinions are beyond their expertise.

As set forth by applicant in her Answer, Dr. Schwartz initially examined applicant in 2015 and 2016 while she was unrepresented. Then, in his December 3, 2020 and May 5, 2021 reports, he failed to provide a meaningful discussion of applicant's current impairment as to CRPS. Based on the record before us, Dr. Schwartz's reports are not substantial evidence as to applicant's permanent impairment. It is well established that decisions by 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, supra*; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is

more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hosp. v. Workers’ Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence “. . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Yet, Dr. Schwartz has not stated that those opinions would be outside of his expertise. Consequently, on the current record, applicant has failed to demonstrate that the orthopedic QME Dr. Schwartz is not qualified to offer his opinion regarding applicant’s diagnosis, impairment or work restrictions.

We therefore agree with defendant that applicant has not shown good cause at this juncture that an additional panel in pain management is warranted. Upon return, we recommend that the parties proceed with further development of the record as to the opinions of Dr. Schwartz.

Accordingly, we will grant defendant’s Petition and rescind the Amended F&O and substitute a new Findings of Fact in its place, which finds that applicant sustained injury AOE/COE to her neck, bilateral elbows, bilateral wrists, bilateral shoulders, and CRPS, and that applicant did not show good cause for an additional QME panel in the specialty of pain management.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration by defendant of the Amended Findings & Order issued by the WCJ on September 1, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Amended Findings & Order issued by the WCJ on September 1, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Francelia Diaz, while employed by defendant Medtronic, Inc. as a quality control inspector, on September 4, 2013, sustained injury arising out of and in the course of employment to her neck, bilateral elbows, bilateral wrists, bilateral shoulders, and Chronic Regional Pain Syndrome (CRPS).
2. On September 4, 2013, Medtronic, Inc. was insured for workers' compensation by Ace American Insurance Company.
3. Good cause has not been shown for an additional QME panel in pain management.
4. All other claimed body parts are deferred.
5. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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

**FRANCELIA DIAZ
LAW FIRM OF ROWEN, GURVEY & WIN
PEARLMAN, BROWN & WAX**

HAV/pc

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