

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

MANUEL DE JESUS CHAVAC, *Applicant*

vs.

**99 CENTS ONLY STORES, LLC;
PERMISSIBLY SELF-INSURED, ADMINISTERED BY ATHENS ADMINISTRATORS,
*Defendants***

**Adjudication Number: ADJ14953769
Long Beach District Office**

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

Applicant seeks reconsideration in response to the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 2, 2022. As relevant herein, the WCJ found that Qualified Medical Evaluator (QME) Panel number 780460 was valid.

Applicant contends that Panel number 780460 is invalid because defendant did not serve applicant's attorney with its March 10, 2022 denial letter so that applicant did not have an opportunity to object and therefore that defendant did not comply with Labor Code section 4060¹ or Administrative Director (AD) Rule 30(b) (Cal. Code Regs., tit. 8, § 30(b)) in procuring the panel.

Defendant filed an Answer to applicant's Petition for Reconsideration contending that Panel number 780460 was valid. Defendant contends Panel number 780460 is valid because defendant raised the affirmative defense of denying liability for applicant's claim of injury as arising out of and occurring in the course of employment (AOE/COE) in its Answer to applicant's Application for Adjudication of Claim (Answer), and properly served that Answer. We received a Report and Recommendation (Report) from the WCJ on the Petition from Reconsideration recommending that we deny reconsideration.

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and based upon the WCJ's analysis of the merits of the petitioner's arguments in the WCJ's report, we will grant reconsideration, affirm the WCJ's F&O, except that we will amend it to find that Panel number 748460 is invalid and that the parties shall proceed with Panel number 7483530.

FACTUAL BACKGROUND

Applicant claims injury during the period from June 22, 2020 to June 22, 2021 to various body parts while employed by the defendant.

Applicant filed an Application for Adjudication of Claim on July 27, 2021. Defendant filed its Answer on March 17, 2022. In its Answer, defendant stated "Injury" was "DENIED AOE/COE, POST-TERM FILING". (*Id.* at p. 2.)

In a letter to applicant dated March 10, 2022, defendant stated "[a]fter careful consideration of all available information, we are denying all liability for your claim of injury alleged as there is no substantial legal, medical or factual evidence to indicate that your alleged injury resulted from your employment at [the defendant employer]." According to the letter, it was sent to applicant, but it was not sent to applicant's attorney. (Defendant's Exhibit A, Denial of Claim, March 10, 2022, p. 1.)

On March 28, 2022, defendant requested a QME Panel in the specialty of orthopedic surgery. Defendant attached the March 10, 2022 denial letter to its request. (Applicant's Exhibit 1, Defendant's Panel Request Packet and QME Panel No. 7480460, March 28, 2022, pp. 4-6.) The Medical Unit issued Panel number 748460 in response to defendant's request. (*Id.* at p. 1.) Defendant served the Panel and the request on applicant. (*Id.* at p. 2.)

In a letter to defendants dated April 15, 2022 applicant's attorney wrote:

Please note that this office objects to the issuance of this Panel as being invalid due to being improperly requested. ¶ Please be further advised that the applicant will not attend any Panel QME evaluation from the orthopedic Panel until this matter is fully litigated in the courts. ¶ Without waiving our objection, we strike Dr. Ersno Eromo from the list.

(Applicant's Exhibit 4, Applicant Attorney Objection to Defense Counsel Regarding QME Panel 7480460, April 15, 2022, p. 1.)

The parties proceeded to trial on September 13, 2022. The issues for trial were whether QME Panel number 7480460 is valid and whether Panel number 7483530 is duplicative and should be stricken. While Panel 7483530 is not in evidence, the parties admit, and the minutes at trial reflect, that the dispute between them was only as to which of the two Panels was valid.

In his Petition, applicant contends Panel number 7480460 was improperly procured by defendant and should therefore be found invalid under section 4060 or AD Rule 30(b) and that the parties should proceed with Panel number 7483530.

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, 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 regarding a threshold issue. Accordingly, the WCJ’s decision is a final order subject to reconsideration rather than removal.

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 defendant’s Answer could be used as a basis to request a 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.

To obtain a QME panel in a represented case, section 4062.2 provides, in relevant part, as follows:

- (a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
- (b) No earlier than the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060 or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. The party submitting the request shall designate the specialty of the medical evaluator, the specialty of the medical evaluator requested by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. **The party submitting the request form shall serve a copy of the request form on the other party.**

(Lab. Code, § 4062.2(a)-(b), emphasis added.)

AD Rule 30 further requires a party requesting a QME panel in a represented case to provide the following documentation when submitting a panel request (if not a panel request under section 4060): “a written objection indicating the identity of the primary treating physician, the date of the primary treating physician’s report that is the subject of the objection and a description of the medical determination that requires a comprehensive medical- legal report to resolve, for disputes covered by Labor Code sections 4061 and 4062.” (Cal. Code Regs., tit. 8, § 30(b)(1)(B)(2).)

While the Answer to the Application was properly served by the defendant, and applicant's attorney may have been aware that defendant denied injury as a result, the Answer did not include a "request for a medical evaluation pursuant to Section 4060" as required by section 4062.2 and AD Rule 30(b). As part of defendant's Exhibit B, the panel "packet," defendant included its denial letter of March 10, 2022, but this letter was not served on applicant's attorney as required by section 4062.2(b). Accordingly, applicant's attorney was not afforded due process by way of an opportunity to object, as set forth under section 4062.2(b). "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537]). Therefore, Panel number 780460 is invalid.

Accordingly, we will amend the F&O and find that defendant's panel was invalid and that the parties shall proceed with Panel No. 7483530.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued by the WCJ on December 2, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on December 2, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. Defendant did not serve applicant's attorney with the denial letter of March 10, 2022.
4. QME Panel No. 7480460 is not a valid panel per Labor Code section 4062.2.

ORDER

IT IS ORDERED that QME Panel number 7480460 is stricken and the parties shall select a QME from Panel number 7483530.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 28, 2023

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

**MANUEL DE JESUS CHAVAC
GARRETT LAW
GRIFFIN LOTZ & HOLZMAN**

HAV/pc

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