

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

MICHELLE ESCAMILLA, *Applicant*

vs.

UPS; LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ15448122
Pomona District Office**

**OPINION AND DECISION AFTER
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate except for the apparent clerical error on page 3 wherein the WCJ recommends that the petition be denied, we will rescind the WCJ's decision and substitute a new Findings and Order, which finds that parties utilize qualified medical evaluator (QME) Panel Number 7479827 (Chiropractic DCH).

We first note that applicant's petition was verified and timely filed on September 6, 2022. Although we did not act upon the petition by November 7, 2022, as required by section 5909, it was through no fault of applicant. We believe that "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. (*Shiple, supra*, 7 Cal.App.4th 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.) Therefore, considering that applicant filed a timely petition and that the WCAB's failure to act was due to a clerical error by the district office, we find that our time to act on the petition is tolled.

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 only challenging an interlocutory finding/order in the decision. 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, for the reasons stated in the WCJ's report, we are persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Labor Code section 4062(a) states in full:

If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610, the objecting party shall notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented by an attorney or within 30 days of receipt of the report if the employee is not represented by an attorney. These time limits may be extended for good cause or by mutual agreement. If the employee is represented by an attorney, a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained. If the employee is not represented by an attorney, the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators, the evaluation shall be obtained as provided in Section 4062.1, and no other medical evaluation shall be obtained.

To obtain a QME panel in a represented case, Labor Code section 4062.2(b) provides, in relevant part, as follows:

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.

Thus, the party first requesting a QME panel has the legal right to designate the panel specialty pursuant to Labor Code section 4062.2(b). (See also Cal. Code Regs., tit. 8, §30.5 ["Medical Director shall utilize in the QME panel selection process the type of specialist(s) indicated by the requestor"].) However, an opposing party may submit a written request for a replacement QME panel in another specialty to the Medical Director on the basis that the chosen specialty "is medically or otherwise inappropriate for the disputed medical issue(s)" pursuant to AD Rule 31.5(a)(10). Either party may appeal the Medical Director's decision regarding the appropriateness of the panel specialty to a WCJ as provided in AD Rule 31.1 (b).

Here, it is undisputed that applicant requested a panel first, and obtained Panel Number 7479827 (Chiropractic DCH). Defendant objected to Panel Number 7479827 on the basis that the proper specialty in this case is Orthopedic Surgery (MOS). The Medical Unit then appropriately directed the parties to adjudicate their dispute before the WCAB.

It is acknowledged that a chiropractor may not perform surgery or prescribe medications. However, this does not preclude a chiropractor from acting as a QME. QMEs are expressly required to “[r]efrain from treating or soliciting to provide medical treatment, medical supplies or medical devices to the injured worker.” (Cal. Code Regs., tit. 8, § 41(a)(4).) A chiropractic QME may not provide treatment to an injured worker while also acting as the QME and thus, applicant's specific treatment needs are not relevant to whether chiropractic is a medically appropriate specialty in this matter. Additionally, all QMEs must complete a course of instruction in disability evaluation report writing. (Cal. Code Regs., tit. 8, § 11.5.) Chiropractic QMEs are also required to be certified. (See Lab. Code, § 139.2(b); Cal. Code Regs., tit. 8, §§ 11(a)(4), 14.) This includes certification in workers' compensation evaluation through a mandatory course that addresses, among other topics, the proper use of the AMA Guides and medical treatment utilization schedule (MTUS). (Cal. Code Regs., tit. 8, § 14.) Chiropractors are consequently held to the same standard as other physicians that act as QMEs.

Accordingly, we rescind the September 6, 2022 Findings and Award and substitute a new Findings and Order that the parties utilize Panel Number 7479827 (Chiropractic DCH).

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of September 6, 2022 is **RESCINDED**, and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. MICHELLE ESCAMILLA while employed on 09-23-2021 as a loader/unloader by UPS, whose workers' compensation insurance carrier was LIBERTY MUTUAL INSURANCE COMPANY, sustained injury arising out of and occurring in the course of employment to the knee.
2. Applicant obtained Panel Number 7479827 (Chiropractic DCH).
3. Defendant objected to Panel Number 7479827 on the basis that the proper specialty in this case is Orthopedic Surgery (MOS).

4. A chiropractic panel is not medically or otherwise inappropriate to address the disputed medical issues for this claim.
5. It is ordered Panel Number 7479827 is valid.

ORDER

GOOD CAUSE APPEARING THEREFORE:

IT IS ORDERED THAT the parties utilize chiropractic Panel Number 7479827.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 27, 2023

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

**MICHELLE ESCAMILLA
LAW OFFICES OF JAMES YANG
ASA LAW**

AS/mc

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

**REPORT AND RECOMMENDATION
ON PETITION FOR REMOVAL**

INTRODUCTION

Petitioner:	Applicant
Timeliness of Petition:	Timely
Verification:	Verified
Issue:	Invalidation of Panel #7479827

Applicant, Michelle Escamilla, sustained injury to the knee arising out of and occurring in the course of employment as a loader/unloader for defendant UPS.

Trial went forward on this limited issue: Whether defendant may seek a replacement QME panel in the specialty of orthopedic surgery. Defendant objected to Panel #7479827 (Chiropractic DCH) obtained by applicant. The objection was the proper specialty in this case is Orthopedic Surgery (MOS).

No testimony was offered at trial. No trial brief was filed by applicant. Defendant filed a trial brief, defendant has not filed a response to applicant's Petition for Removal.

Following submission of the issue at trial, Findings of Fact issued concluding no medical evidence was found to support Chiropractic as the proper specialty for a PQME. It was Ordered that Panel Number 7479827 be invalidated and to allow defendant to submit a panel request in the specialty of Orthopedic Surgery (MOS).

Applicant timely filed a Petition for Removal of the Findings of Fact and Award.

DISCUSSION

Removal is an extraordinary remedy not often exercised by the Appeals Board. (Cortez v. Workers' Comp. Appeals Bd. (2006) 136 Cal. App. 4th 596, 600 fn. 5 [71 Cal. Comp. Cases 155, 157, fn. 5]; Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 274, 281, fn. 2 [70 Cal. Comp. Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (8 CCR 10843(a). In addition petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (8 CCR 10843(a).)

The Opinion on Decision issued with the Findings of Fact and Award based the decision the proper medical specialty was orthopedic surgery on the nature of treatment provided to the applicant.

In the Petition for Removal, applicant contends error in invalidating Panel Number 7479827. Based in part on a panel decision (*Virrueta v. State of California*), not designated as a significant panel decision, the argument was made a chiropractic panel was not found to be inappropriate to evaluate the applicant's claimed injury to the knees. In the Decision and Opinion after Reconsideration, the Board agreed with the trial WCJ that the party first requesting a QME Panel has the legal right to designate the panel specialty pursuant to Labor Code Section 4062.2(b). Further, it acknowledged that while a chiropractor may not be able to provide some treatment such as surgery or prescribe medication that does not preclude the chiropractor from acting as a QME.

The issue of a chiropractic panel being appropriate as opposed to an orthopedic surgeon was addressed in *Ramirez v. Jaguar Farm Labor Contracting Inc.*, (2018) 84 Cal.Comp.Cases 56. The Petition for Removal argues that case in support of the contention the issue of treatment or commenting on applicant's specific treatment needs is not relevant to whether the chiropractor is a medically appropriate specialty in that case.

In the present case applicant did obtain Panel Number 7479827 (Chiropractic DCH). Defendant objected to that panel on the basis the proper specialty was orthopedic surgery (MOS). The Medical Unit deferred jurisdiction over the proper medical specialty to the WCAB by notice to the parties dated April 7, 2022. No legal authority has been submitted on the issue of the validity of the Chiropractic DCH panel to disqualify that specialty for purposes of evaluating the applicant's claim of injury to the knee. No determination was made by the Medical Unit prior to deferring jurisdiction to the WCAB.

RECOMMENDATION

[* * *]

In consideration of the legal authority cited in the Petition for Removal it is determined the Order to invalidate Panel Number 7479827 be rescinded. Applicant may proceed with the Panel (Chiropractic DCH).

This Order does not preclude parties from raising the issue of additional QME Panels as discovery continues.

DATE: September 27, 2022

Sharon Bernal
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE