

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

**GRACIELA MAGDALENO, *Applicant***

**vs.**

**INTERNATIONAL PAPER; OLD REPUBLIC INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13569546; ADJ17558358  
Salinas District Office**

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

Applicant seeks reconsideration of a May 13, 2024 Findings and Order (F&O) wherein a workers' compensation administrative law judge (WCJ) found that while employed as a forklift driver for defendant up to April 30, 2019, applicant claimed injury to various body parts (Case No. ADJ17558358) and sustained injury on April 30, 2019 arising out of and in the course of employment (AOE/COE) to her neck, left shoulder, and right wrist (Case No. ADJ13569546); "All three panel requests made in ADJ17558358 were made during a period when no legal dispute existed to be resolved"; and that as of May 2, 2024, "a legitimate dispute exists as to AOE/COE in ADJ17558358." The WCJ ordered that all panels in in ADJ17558358 were invalid and that either party may request "a replacement panel" beginning on May 30, 2024 in "whatever specialty they find appropriate" and that any dispute as to the correct specialty was "deferred to the Medical Unit, subject to ordinary right of appeal."

Applicant contends that the request for a panel qualified medical evaluator (QME) was valid when it was submitted; and that if the panel is invalid, "there currently exists no valid basis for a QME panel to issue" so that the order regarding a replacement panel should be rescinded.

We have not 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 Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant applicant's Petition, rescind the F&O and substitute a new F&O to find that applicant's request for a QME panel is valid. We make no other substantive changes to the F&O.

## FACTS

On September 22, 2020, applicant filed an Application for Adjudication alleging that while employed by defendant as a forklift driver on April 30, 2019, applicant sustained an industrial injury to her neck, left shoulder, and right wrist.

On March 14, 2023, primary treating physician (PTP), Dr. Annu Navani issued a report following her examination of applicant. (Exhibit I.) In an Addendum, in response to a letter from defendant's attorney, "regarding the patients [sic] complaints being related to CT from her continuous employment of 28 years until 2019. The answer is yes, based on [reasonable] medical probability, there is a component of CT associated s/s here. The exact causation and apportionment is best addressed via a ML evaluation by a QME/AME." (Exhibit I, p. 7.)

On April 12, 2023, defendant filed an Application alleging that applicant sustained a cumulative injury for the period from January 4, 1991 to April 30, 2019 to her wrist, neck and shoulders.

On June 20, 2023, defendant issued an acknowledgment letter for the claim of injury of "April 30, 2019." (Exhibit 3.)

On June 30, 2023, defendant filed an answer denying injury for the cumulative injury up to April 20, 2019.

On July 5, 2023, defendant issued a notice of denial for the claim of injury of "April 30, 2019." The box regarding requesting a QME panel is not checked. Significantly, this box explains the procedure for requesting a QME and states as follows:

If you disagree with the decision to deny your claim and wish to obtain a comprehensive medical evaluation, enclosed is a form that you must submit to the state Division of Workers' Compensation (DWC) within **10 days** to request a panel of three Qualified Medical Evaluators (QMEs). If you do not submit the form within **10 days** we will have the right to submit the form. In addition, within **10 days** after the DWC sends you a panel, you must choose a QME from the panel, make an appointment to be examined by the QME, and inform me of your choice and appointment time. If you inform us of your choice but you do not arrange the appointment, we will arrange the appointment. If you do not inform us of your

choice, we may choose the QME who will examine you and arrange the appointment. (Bold in original.)

The only box checked states that “If you are represented, you may contact your attorney with any questions.” However, a panel request for an unrepresented employee was attached. (Exhibits 2, K.)

On July 21, 2023, an orthopedic QME panel issued for the injury of “April 30, 2019” and identified defendant’s attorney and applicant’s attorney; according to the Declaration of Service, only defendant’s attorney and applicant’s attorney were served with the panel. (Exhibit A.)

At the time the panel issued, applicant was unrepresented on the cumulative injury case.

According to the Fee Disclosure Statement and Declaration Pursuant to Labor Code Section 4906(h), applicant subsequently became represented on July 28, 2023, and that same day, requested a chiropractic QME panel pursuant to “*Romero*.” The Medical Unit denied this request as defendant’s orthopedic panel had already issued.

On May 2, 2024, the parties proceeded to trial. The sole issue was whether a QME panel should issue in the cumulative injury claim.

## DISCUSSION

A petition for reconsideration is taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order is defined as one that determines “any substantive right or liability of those involved in the case” or a “threshold” issue fundamental to a claim for benefits. (*Rymer v. Hagler 2* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd.* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]; *Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd.* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian, supra*, at 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’]

does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, and other similar 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 May 13, 2024 F&O addresses both threshold and interlocutory issues. However, applicant’s Petition only challenges the WCJ’s decision regarding procurement of a QME panel. As such, we will consider applicant’s Petition under the removal standard.

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 can show that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a).) The petitioner must also demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Id.*) In the instant case, we are 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.

Turning to the issue of the QME panel request, the procedure for obtaining a QME panel with an unrepresented applicant is governed by Labor Code<sup>1</sup> 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

---

<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

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.

In the instant case, defendant provided applicant with a form to request a QME panel, but did not check the box explaining the process. Thus, it is unclear whether applicant received the requisite notice as an unrepresented injured worker. Then, a represented panel issued as evidenced by the Medical Unit's identification of both attorneys and service on both attorneys of the panel, and the Medical Unit's failure to serve applicant. Since applicant was not represented until July 28, 2023 for the cumulative injury, and the panel was requested and issued as a represented panel on July 21, 2023, defendant's request was invalid.

Subsequent to issuance of defendant's QME panel request, applicant became represented and, through her attorney, issued a request for a chiropractic QME panel. Applicant's request was therefore governed by section 4062.2, which provides, in pertinent part:

(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.

Here, defendant filed an Answer on June 30, 2023, denying the cumulative injury, and on July 28, 2023, applicant appropriately requested a QME panel under section 4062.2 based upon defendant's denial. As such, we conclude that applicant's request for a chiropractic QME panel valid.

Accordingly, we grant applicant's Petition and rescind the WCJ's May 13, 2024 F&O and substitute a new F&O in its place.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the May 13, 2024 Findings and Order is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the May 13, 2024 Findings and Order is **RESCINDED** and the following is **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

1. Graciela Magdaleno, while employed as a forklift driver on April 30, 2019 at Salinas, California, by International Paper, insured for workers' compensation liability by Old Republic Insurance Co., sustained injury arising out of and in the course of employment to the neck, left shoulder, and right wrist.
2. Graciela Magdaleno, while employed as a forklift driver during the period up to April 30, 2019 at Salinas, California, by International Paper, insured for workers' compensation liability by Old Republic Insurance Co., claims to have sustained cumulative injury.
3. A legitimate dispute exists as to AOE/COE in ADJ17558358 pertaining to a cumulative trauma up to April 30, 2019.

**ORDER**

1. Applicant's request for a chiropractic QME panel in ADJ17558358 is valid.
2. Defendant's request for an orthopedic QME panel in ADJ17558358 resulting in the issuance of panel 7604016 is invalid.
3. All other issues are deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**July 22, 2024**

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

**GRACIELA MAGDALENO  
DILLES LAW GROUP  
MATIAN LAW GROUP**

**RL/abs**

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