

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

MACRINO REZA, *Applicant*

vs.

**ZINC POLYMER HOLDINGS, LLC;
PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY,
*adjusted by PMA COMPANIES, Defendants***

**Adjudication Numbers: ADJ17527839; ADJ17527840
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration or in the alternative, removal of the Joint Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on May 24, 2024, wherein the WCJ found that the initial Panel qualified medical evaluator (QME) list was controlling and the other was invalid; that defendant timely struck Dr. Mirzaians from the panel, yet the doctor's report was admissible as self-procured medical reporting; and that no sanctions were warranted against applicant's attorney.

In the Petition for Reconsideration and, in the alternative, Removal (Petition) defendant contends that the first Panel QME list is not controlling because the parties agreed to use the second panel; and that the WCJ erred in finding that Dr. Mirzaians' report is self-procured medical reporting, and in finding that it is admissible. Defendant reiterates its prior request for sanctions.

The WCJ issued a Report and Recommendation on defendant's Petition (Report) recommending that the Petition be denied. Applicant's attorney did not file an Answer.

We have considered the allegations in the Petition and the contents of the WCJ's report 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, we will deny the Petition as one seeking reconsideration.

BACKGROUND

Applicant worked as a maintenance worker for Zinc Polymer Holdings, LLC, doing business as Lifoam Industries, LLC. On April 5, 2023, applicant filed two applications, one for a specific injury to his thoracic and lumbar spine (case # ADJ17527839) and the second for cumulative trauma to his thoracic spine, lumbar spine, cervical spine, right knee, right leg and right foot (case # ADJ17527840).

Applicant's attorney obtained two QME Panels. (Panel # 7574199, issued 4/6/23; Panel # 7575297, issued 4/11/23.) Applicant was examined by Dr. Mirzaians, who filed a medical legal report, despite defendant's striking Dr. Mirzaians from the panel. (4/21/23 Letter from Defense; 8/31/23 Medical Legal Report.)

The matter went to trial on April 8, 2024, for determination of four issues:

1. Whether applicant's attorney properly scheduled the initial QME examination with Dr. Mirzaians following defendant's strike of Dr. Mirzaians from Panel No. 757529[7].
2. Whether Dr. Mirzaians' reporting should be struck from the record.
3. Whether applicant attorney's e-mail dated August 17, 2023 to Dr. Mirzaians is misleading and prejudice[ial] against defendant.
4. Sanctions against applicant's attorney for bad faith litigation under Labor Code 5813.

(4/8/24 MOH, at p. 2.)

At trial, documentary evidence was admitted, and there was no witness testimony. (4/8/24 MOH.) The F&O issued on May 24, 2024.

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 findings regarding threshold issues, including findings regarding employment and insurance coverage. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Defendant's Petition challenges the order that the parties "should proceed with Panel QME list # 7574199," the finding that Dr. Mirzaian's report is admissible and constitutes self-procured medical reporting, and the finding that there was no sanctionable conduct by applicant's attorney. (Petition, at pp. 1-2, 4-6, 8-10.) Thus, although the F&O contains a finding that is final, defendant is challenging interlocutory findings/orders therein. 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, based on the analysis in the WCJ's report, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration/Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 19, 2024

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

**MACRINO REZA
GARRETT LAW GROUP, PC
LAW OFFICES OF BRADFORD & BARTHEL**

MB/ara

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

**REPORT AND RECOMMENDATION ON APPLICANT'S PETITION FOR
RECONSIDERATION AND IN THE ALTERNATIVE REMOVAL**

**I
INTRODUCTION**

1. Date of Injury: December 14, 2021; March 7, 2022 through March 7, 2023.
 Identity of Petitioner: Defendant filed the Petition.
 Timeliness: The petition is timely filed.
 Verification: The petition is verified.

3. Date of Findings of Fact: May 24, 2024

4. **Petitioner's contentions:**
 Defendant contends:
 - (a) the Court acted without or in excess of its powers;
 - (b) the findings of fact do not support the Order;
 - (c) defendant will suffer substantial prejudice and irreparable harm.

**II
FACTS**

On or about April 5, 2023 applicant filed an Application for Adjudication of Claim alleging he sustained a specific injury to his thoracic spine, and lumbar spine while employed by defendant Zinc Polymer Holdings, LLC on December 14, 2021 (ADJ17527839). Also on or about April 5, 2023 applicant filed an Application for Adjudication of Claim alleging he sustained a cumulative trauma injury to his thoracic spine, lumbar spine, cervical spine, right knee, right leg, and right foot while employed by defendant from March 7, 2022 through March 7, 2023 (ADJ17527840). Pursuant to the parties' stipulation, at the time of the above injury, the employer's workers' compensation carrier was Pennsylvania Manufacturers Association Insurance, adjusted by PMA Companies.

In response to the simultaneously filed applications Defendant issued two Notices of Denial of Workers' Compensation Benefit dated March 21, 2023 and March 24, 2023. Following defendant's initial Notice of Denial applicant initiated the QME process pursuant to Labor Code 4060 and 4062 resulting in the DWC Medical unit issuing Panel #7574199 in the specialty of Chiropractic on April 6, 2023 (Exhibit A). Deliberately or unintentionally upon receipt of Defendant's second Notice of Denial applicant again initiated the QME process pursuant to Labor Code 4060 and 4062, but used the second claim number resulting in the DWC Medical unit issuing Panel #7575297 in the specialty of Chiropractic on April 11, 2023 (Exhibit E).

Following receipt of Panel QME list #7574199 and pursuant to Labor Code 4062 both parties struck Dr. Charlotte Burgess from Panel QME list # 7574199. Following receipt of the Panel QME list # 7575297 and pursuant to Labor Code 4062 Defendant struck Dr. Arbi Mizaian from Panel QME list # 7575297 and timely served applicant's counsel with notice of applicant's strike on April 21, 2024 (Exhibit F).

Prior to Trial the parties' attempted to resolve the issue of which Panel QME list is controlling by agreeing to use the second Panel QME list# 7575297 and agreeing Panel #7574199 is moot and invalid (Exhibit H). However, based on the submitted evidence including emails between the parties it remains unclear why parties agreed to use the second Panel QME list #7575297 instead of the initial Panel QME list # 7574199. Additionally, the emails between the parties leave the reader unclear as to whether applicant had the option to schedule the Panel QME exam with any of the three physicians listed on Panel QME list #7575297.

Following review of all the evidence the Court found the initial Panel QME list# 7574199 was properly obtained by applicant's counsel and is to be the controlling Panel QME list for both cases ADJ17527840 and ADJ17521839. The Court found the second Panel QME list# 7575297 was not properly obtained by applicant's counsel and is deemed invalid. The Court recognizes the parties' attempt to stipulate to use the second Panel QME list # 7575297; however, the Court did not accept this procedural stipulation and found Panel QME list # 7575297 invalid. The Court also recognized both parties struck Dr. Charlotte Burgess from Panel QME list # 7574199 and therefore Ordered applicant to select and schedule a Panel QME exam with one of the two remaining physicians from Panel QME list # 7574199 either Dr. Soheila Ghaziaskar or Dr. Mohammed Shouka. Should applicant fail to select and/or schedule the Panel QME exam within fifteen days of service of the Order Defendant may select and schedule the Panel QME exam with either Dr. Soheila Ghaziaskar or Dr. Mohammed Shouka from Panel QME list # 7574199.

The Court found defendant's strike of Dr. Arbi Mizaians was timely and therefore defendant is not liable for the cost of reports issued by Dr. Arbi Mizaians. However, the Court also found pursuant to Labor Code 4605 applicant has the right to obtain medical reporting, at his or her own expense, of a consulting physician or any attending physicians whom he or she desires; and therefore, Dr. Arbi Mizaians medical reporting was found to be admissible and may be relied upon to issue a final finding subject to the reporting meeting the substantial medical evidence threshold. Following review of all the evidence the Court found sanctions under Labor Code 5813 are not warranted at this time, and Ordered the matter off calendar. In response Defendant filed the pending Petition for Reconsideration and in the alternative Petition for Removal.

III **DISCUSSION:**

A Petition for Reconsideration is the appropriate mechanism to challenge a final order, decision, or award (Labor Code Section 5900). An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a final order. See *Maranian v. Workers' Compensation Appeals Board* (2000) 81 Cal. App. 4th 1068 [65 Cal. Comp. Cases 650; *Safeway Stores, Inc. v. Workers' Compensation Appeals Board (Pointer)* (1980) 104 Cal. App. 3d 528 {45 Cal. Comp Cases 410}].

Removal is an extraordinary remedy that may be requested to challenge interim and non-final orders issued by a workers' compensation judge (*Cortez v. Workers' Compensation Appeals Board* (2006) 136 Cal. App. 4th 596,600 fn 5, [71 Cal. Comp.Cases 155, 157, fn 5]; *Kleeman v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 274,281, fn 2 [70 Cal. Comp. Cases 133, 136, fn 2]). The petitioning party must demonstrate that substantial prejudice or irreparable harm

will result if removal is not granted (Title 8 Cal. Code Regulations, Section 10955(a)) and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues.

In the present case defendant's Petition for Reconsideration and in the alternative Petition for Removal argues the Court acted without or in excess of its powers when it found Panel QME list #7575297 is invalid and Panel QME list # 7574199 is valid and controlling despite the parties' agreement to use Panel QME list #7575297 as the controlling panel. After review of all submitted evidence including emails between the parties the Court found no good cause to approve the parties' stipulation to use Panel QME list #7575297 as the controlling panel. To the contrary it appears there was no meeting of the minds as to how to proceed with Panel QME list #7575297 because on the same day applicant's representative emailed defendant's counsel agreeing to use Panel QME list #7575297 (Exhibit H), applicant's counsel called Dr. Arbi Mirzains, whom defendant had previously struck, to schedule the initial Panel QME exam (Exhibit K). Defendant argues applicant's action of calling Dr. Arbi Mirzains to schedule the initial Panel QME exam on the same day the parties agreed to use Panel QME list #7575297 was in bad faith; however, no evidence was submitted to show parties had agreed on which of the three physicians listed on Panel QME list #7575297 was to act as the Panel QME in this matter. Based on the parties' failure to clearly communicate with each other and lack of clarity as to what was actually agreed upon, the Court cannot approve their stipulation to use Panel QME list #7575297.

Defendant's Petition for Reconsideration and in the alternative Petition for Removal also argues defendant will suffer irreparable harm and that the Court acted without or in excess of its powers when it found pursuant to Labor Code 4605 applicant has the right to obtain medical reporting, at his or her own expense, of a consulting physician or any attending physicians whom he desires, and thus found Dr. Arbi Mizaian's medical reporting to be self-procured and admissible pursuant to Labor Code 4605. Defendant does not object to the Court finding defendant's strike of Dr. Arbi Mizaian's from Panel QME list# 7575297 was timely and therefore defendant is not liable for the cost of reports issued by Dr. Arbi Mizaian's. However, defendant request the Court take additional steps and find all reporting of Dr. Arbi Mizaian's be deemed inadmissible.

It is important to note the WCJ did not address whether Dr. Arbi Mizaian's medical reporting meets the substantial medical evidence threshold because that issue was not before the Court. Instead the Court addressed whether Dr. Arbi Mizaian's medical reporting is admissible, and found the reporting to be admissible pursuant to Labor Code 4605. The Court finds defendant's argument that applicant's counsel must pay for the reporting of QME Dr. Mirzaian's, but must also be precluded from submitting QME Dr. Mirzaian's reporting as evidence to be unjust and contrary to the Labor Code 3202, mandating liberal construction of workers' compensation laws.

Lastly the Defendant's Petition for Reconsideration and in the alternative Petition for Removal argues applicant's counsel should be sanctioned for scheduling the initial Panel QME exam with Dr. Mirzaian's and for including Dr. Mirzaian's office in the email string directed to defense counsel dated August 17, 2023 (Exhibit L). However, as discussed above after review of all submitted evidence including emails between the parties the Court found there was no meeting of the minds as to resolving the Panel QME issue. The parties did not submit a signed stipulation for the Court to review. Instead parties submitted an email from applicant's representative dated July 7, 2023

addressed to defense counsel wherein applicant agrees to use the second Panel QME list # 7575297 and agrees Panel list #7574199 is moot and invalid (Exhibit H). The evidence submitted at Trial does not contain an agreement addressing whether defendant's prior strike of Dr. Mirzains was timely. The evidence submitted at Trial does not contain an agreement as to which of the three physicians on Panel QME list # 7575297 may act as the QME in this matter. Based on the parties' failure to clearly communicate with each other and lack of clarity as to what the parties' actually agreed upon, the Court cannot determine if the parties acted in bad faith following the alleged agreement to use Panel QME list # 7575297 instead of Panel list #7574199.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully requested that defendant's Petition for Reconsideration and in the alternative Petition for Removal be denied.

Date: 06/24/2024

EDGAR MEDINA
Workers' Compensation Judge