

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

**PORSHA MARTIN, *Applicant***

**vs.**

**BAKERSFIELD BEHAVIORAL HOSPITAL; TRAVELERS PROPERTY & CASUALTY  
CO. OF AMERICA, administered by TRAVELERS, *Defendants***

**Adjudication Number: ADJ12590930  
Bakersfield District Office**

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

Applicant seeks removal in response to the Order dismissing her petition for additional qualified medical evaluator (QME) panels (Order) issued by the workers' compensation administrative law judge (WCJ) on January 27, 2023.

Applicant contends that the Order denying her petition based upon Rule 31.7<sup>1</sup> is in error because there is no written agreement by the parties for the additional panels, and thus the WCJ must determine if good cause exists for additional QMEs in the field of dentistry, psychology, and internal medicine.

We did not receive an Answer from defendant. We received a Report and Recommendation (Report) from the WCJ, which recommends denial of the Petition for Removal.

We have considered the allegations in the Petition and the contents of the Report. Based on our review of the record, and as discussed below, we will grant the Petition for Removal, rescind the January 27, 2023 Order Dismissing applicant's petition, and return this matter to the district office for further proceedings.

**BACKGROUND**

Applicant, while employed by defendant during the period from October 31, 2018 to July 24, 2019, claimed industrial injuries to her hand, wrist, shoulder psyche, jaw, teeth, right elbow, back, GERD, headaches, and digestive system.

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<sup>1</sup> Cal. Code Regs., tit. 8, § 31.7.

According to applicant's Petition, QME Andrew Rah, M.D., evaluated applicant on November 10, 2022, and issued a report in which he deferred applicant's psychological, dental and internal medicine diagnoses to the appropriate specialists.

Thereafter, on January 25, 2023, applicant's counsel emailed defendant to inquire as to whether they would agree to obtain additional panels as stated by Dr. Rah. Applicant states that defendant did not agree to the additional panels.

On January 26, 2023, applicant filed a petition for additional panels in the field of dentistry, psychology, and internal medicine.

On January 27, 2023, the WCJ issued the Order dismissing applicant's Petition.

Applicant thereafter filed her Petition for Removal.

### **DISCUSSION**

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (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 substantial 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).)

Parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant..." (*Id.* at p. 158.) As stated by the Supreme Court of California in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission...must find facts and declare and enforce rights and liabilities, - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

In the January 27, 2023 Order dismissing applicant's Petition, the WCJ merely states:

**"IT APPEARING THAT** Applicant has petitioned on January 26, 2023 for three additional QME panels. Additional QME panels should be requested from

the Medical Unit on Form 31.7, attaching the report from Dr. Rah recommending the additional panels.

**GOOD CAUSE APPEARING;**  
**IT IS ORDERED THAT** the January 26, 2023 petition be, and hereby is, dismissed without prejudice.”

The WCJ does not discuss the reasoning for his decision. Additionally, the Order issued without a hearing, no minutes were prepared and no testimony was taken, and the WCJ did not provide a summary of the evidence he relied upon in making his decision.

Decisions of 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 v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Bd. en banc) (*Hamilton*).)

As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.) The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton, supra*, at p. 476 citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Here, it appears that the WCJ based his decision solely on the misconception that applicant could obtain the additional panels without either agreement of the defendant or an order by a WCJ by submitting the Form 31.7 request to the Medical Director along with the QME report supporting the request.

Rule 31.7(b) and (c) provide for an additional QME panel in another specialty as follows in relevant part:

(b) Upon a showing of good cause that a panel of QME physicians in a 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:

(1) A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or

(2) Where an acupuncturist has referred the parties to the Medical Unit to receive an additional panel because disability is in dispute in the matter; or

(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;

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(c) Form 31.7 shall be used to request an additional QME panel in a different specialty.

We agree that Form 31.7 is the correct form to use when requesting that the Medical Director issue an additional QME panel in a different specialty. It should be noted however, that Rule 31.7 (b) states that the Medical Director will issue an additional panel after good cause is shown, *not before*. Good cause is a determination that must be made by the WCJ. Once a WCJ determines that good cause exists, the WCJ then must issue an order finding that an additional evaluation is reasonable and necessary to resolve the disputed issues under Labor Code sections 4060, 4061, or 4062. Upon receipt of such an order, the Medical Director shall issue a panel of QMEs. (*Alexander v. Lowe's Home Ctrs.* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 182; *Rollins v. John Martin Stables, Inc.*, (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 94; Cal. Code Regs., tit. 8, § 32.6.)

Applicant alleges in his petition that the orthopedic QME has indicated he would defer evaluation in fields outside of orthopedic medicine to the appropriate specialists. That is, applicant contends that the reporting of Dr. Rah supports an order by the WCJ for a panel of QME physicians in the specialties of dental, psychiatry, and internal medicine. While the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues, no record was made in this instance as to the basis for the WCJ's dismissal of applicant's petition for additional panels.

Thus, we are unable to determine if good cause exists at this juncture due to a lack of a record. Therefore, we must rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion. However, we note that since applicant claims injury to

body parts outside the field of orthopedic medicine, it appears that additional QME panels will be required to fully address the claimed injury.

We observe that when applicant filed her petition for additional panels, the WCJ should have set the matter for hearing and/or issued a notice of intention to either grant or deny the petition pursuant to WCAB Rule 10832 (Cal. Code Regs., tit. 8, § 10832). Then the WCJ could have created a record, and then issued a decision. (See Lab. Code, § 5313; Cal. Code Regs., tit. 8, §§ 10510, 10750; 10758.) We note that had a notice of intention to deny the additional panels issued and a hearing set, the Petition for Removal may have been avoided in the first instance.

Accordingly, we grant applicant's Petition for Removal, rescind the January 27, 2023 Order, and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Removal in response to the Order issued on January 27, 2023 by the WCJ is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board that the Order of January 27, 2023 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



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

**March 5, 2024**

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

**PORSHA MARTIN  
LAW OFFICE OF SAAM AHMADINIA, APC  
BRADFORD BARTHEL**

**LAS/ara**

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