WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

YVETTE ARELLANO, ***Applicant***

vs.

DIN TAI FUNG RESTAURANT, LLC;
STARR INDEMNITY LIABILITY
administered by GALLAGHER BASSETT,
Defendants

Adjudication Number: ADJ17646368
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and Removal and the contents of the Report and Recommendation (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 Opinion on Decision and the Report, both of which we adopt and incorporate, we will deny reconsideration.

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
> (b)
> > (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

According to Events, the case was transmitted to the Appeals Board on October 17, 2024, and 60 days from the date of transmission is December 16, 2024. This decision is issued by or on December 16, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 17, 2024, and the case was transmitted to the Appeals Board on October 17, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 17, 2024.

II.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*)

(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]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 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, or similar issues.

To the extent that defendant seeks review of a non-final order as to the dispute over the panel specialty, 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).)

The Labor Code permits a request for a medical-legal evaluation for disputes over the compensability of an injury (Lab. Code, § 4060), objections to the extent of permanent impairment and limitations or "the need for future medical care" (Lab. Code, § 4061), or objections "concerning any medical issues . . . not subject to Section 4610 [utilization review]" (Lab. Code, § 4062(a)). Here, the WCJ acted within his authority when he concluded that the QME panel in gastroenterology was the appropriate panel specialty. If we accepted defendant's premise that AD Rule 31.1(b) requires a determination by the Medical Director before a WCJ has jurisdiction to decide a dispute as to panel specialty, we would be abrogating the authority of the WCAB. This is because it is the WCAB that has "full power, authority, and jurisdiction to try and determine' all workers' compensation claims" under Labor Code section 5301, and not the Medical Director. (*Porcello v. State of California Department of Corrections and Rehabilitation* (2020) 85

Cal.Comp.Cases 327 [2020 Cal. Wrk. Comp. P.D. LEXIS 9] [parties are not required to await determination from the Medical Unit regarding the panel specialty before a WCJ can address the issue]; see *Contreras v. Randstad North America* (January 22, 2020, ADJ12431303) [2020 Cal. Wrk. Comp. P.D. LEXIS 12] [determination of causation of injury is within the Appeals Board's exclusive jurisdiction and not the Medical Director]; *Barroso v. Hartnell College* (September 12, 2019, ADJ11211443) [2019 Cal. Wrk. Comp. P.D. LEXIS 426]; *Resendiz v. Tambro, Inc.* (August 16, 2019, ADJ11426145) [2019 Cal. Wrk. Comp. P.D. LEXIS 325]; *Lemus v. Motel 6/G6 Hospitality* (June 27, 2019, ADJ11595561, ADJ11602485) [2019 Cal. Wrk. Comp. P.D. LEXIS 262]; *Ramirez v. Jaguar Farm Labor Contracting, Inc.* (2018) 84 Cal.Comp.Cases 56 [2018 Cal. Wrk. Comp. P.D. LEXIS 442]

Here, for the reasons stated in the WCJ's Opinion and in his Report, defendant has failed to show that significant prejudice or irreparable harm will result from the order to proceed with an evaluation by Dr. Raban. With respect to the final finding as to the award of fees against defendant, we see no reason to disturb the WCJ's conclusion that defendant did not have good cause to cancel the evaluation and that the action was in bad faith. In particular, we note that as pointed out in the WCJ's Report, the WCJ took the matter off calendar at the April 8, 2024 mandatory settlement conference (MSC) so that applicant could obtain the panel, and then again at the May 13, 2024 MSC ***because the QME evaluation was pending***. Yet, just four days later, on May 17, 2024, defendant *unilaterally* cancelled the May 21, 2024 evaluation. This conduct appears to be without merit and taken with the intention to "cause unnecessary delay." (Lab. Code, § 5813.)

Accordingly, we deny the Petition for Reconsideration and Removal.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 16, 2024

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

YVETTE ARELLANO
GRAIWER, KAPLAN, VERNIK & EVANS
DIETZ, GILMOR & CHAZEN

LN/*pm*

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 PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. **IDENTITY OF PETITIONER:** Defendants Din Tai Fung Restaurant, LLC, Glendale and Starr Indemnity Liability New York, administered by Gallagher Bassett
2. **TIMELINESS:** The Petition was timely filed on 10/03/2024.
3. **VERIFICATION:** The Petition is verified.
4. **PETITIONER'S CONTENTION(S):** The WCJ erred in his decision dated 09/12/2024 in finding Panel QME #7668503 is medically appropriate and that the defendants' unilateral cancellation of the QME appointment was improper, and awarding attorney's fees against Defendant.
5. **DATE EAMS FILE TRANSMITTED TO APPEALS BOARD:** 10/17/2024

II
RELEVANT FACTS

Applicant YVETTE ARELLANO, […] while employed on April 6, 2023, as a hostess, Occupational Group Number 240, at Glendale, California by DIN TAI FUNG RESTAURANT, LLC GLENDALE, sustained injury arising out of and in the course of employment to her right index finger when a heavy restroom door closed on her fingertip and fractured it.

In addition to the admitted finger injury, Applicant claimed additional parts of body including right hand, right wrist, nervous system, neurological system, constipation, and digestive system. Petitioner accepted only the right index finger injury.

On February 12, 2024, Applicant's counsel wrote petitioner and requested a consultation with an internist within the MPN.

Applicant initiated the PQME process and obtained Panel#7668503 on February 26, 2024 with internal medicine (gastroenterology) as the specialty. Petitioner objected to the selected specialty and made a strike from the disputed panel on February 29, 2024.

Applicant filed a DOR on March 1, 2024 for medical treatment, asserting that the treating physician had made referrals to other specialties and that the Applicant required evaluations in these specialties.

Defendant then requested a replacement panel from the Medical Unit on March 20, 2024.

The matter came for an MSC on April 8, 2024 and was continued to May 13, 2024, allowing time for the Medical Unit to respond.

The Medical Director responded on April 30, 2024 by writing to Applicant's counsel, stating in relevant part:

"We have received a request from defense attorney to change the specialty for panel #7668503. Before making our decision, we would like to give you the opportunity to provide information that you believe supports your request for MMG gastroenterology in this case."

Applicant's counsel apparently did not submit any additional information to the Medical Unit in response to the letter, but scheduled a PQME exam with internist Dr. Rahban for 05/21/2024 [Applicant's Exhibit 1].

The matter came to hearing for another MSC on May 13, 2024, and was taken off calendar with the Court noting "Gastro PQME scheduled for later this month."

It does not appear from the record that the Medical Director issued a determination of whether the selected specialty is inappropriate.

Petitioner then unilaterally cancelled the appointment with the Dr. Rahban, and filed an Emergency Petition for Stay on Friday evening at 11:41pm on May 17, 2024.

Applicant filed a Petition for Penalties in response on May 20, 2024.

A walk through appearance was made on May 21, 2024, and the case was set for Trial on the issues of both the Emergency Petition for Stay and Petition for Penalties.

The matter came for hearing on June 11, 2024. The undersigned WCJ issued a decision on September 11, 2024, finding that good cause had not been demonstrated for cancellation of the PQME exam, and awarding attorney's fees against Petitioner.

III
DISCUSSION

QME Appointment Cancellation

The key determination in this matter is whether Petitioner showed good cause for cancellation of a duly scheduled QME examination within six business days of the appointment. Petitioner argues that a pending decision from the Medical Director constituted good cause, but the Court had already held two MSC's waiting for the Medical Director's decision without receiving one.

In this matter, Applicant claimed internal injury on the Application for Adjudication. Applicant had requested a consultation with an internist per recommendation of her primary treating physician, but never received a consultation. The issue of internal evaluation came to an MSC, and was continued to allow time for the Medical Unit to respond to Petitioner's request, which it did not. The matter was then taken off calendar specifically for the purpose of the scheduled gastro QME evaluation, and Petitioner did not appeal the MSC ruling, but instead cancelled the exam unilaterally.

The Court therefore deemed that Defendant had not demonstrated good cause for the unilateral cancellation, with Applicant already having waited nearly a year to be evaluated for her internal complaints and the record in need of development in that area.
Failing to comply with a Regulation constitutes sanctionable conduct under 8 Cal. Code of Regs. §10421(b)(4). Unilateral cancellation of a QME examination without good cause within six days of the exam is prohibited under 8 Cal. Code of Regs. §34(h). Defendant proceeded to do so anyway, and then filed for a stay after the cancellation had been done. This has resulted in yet more delays in getting the Applicant evaluated for her internal injury claim, warranting the imposition of attorney's fees for the unnecessary delay.

Substantial Evidence

Petitioner argues that there is no substantial medical evidence supporting the Court's finding. However, the Court is not making a medical determination of the Applicant's condition. Rather, the Court is only determining whether it would be appropriate for an internist to report on a case which includes a claim, albeit denied, for internal injury. It is axiomatic that evaluation by an internist is medically appropriate for a claim of internal injury. This does not require substantial medical evidence, for instance, like a determination of disability or need for treatment would require.

Attorney's Fees – Due Process

Petitioner argues that there was no notice or opportunity to be heard on the issue of imposition of attorney's fees. However, the Petition for Penalties was filed prior to the walk through appearance, in which it was noted that the penalty petition was being set for trial. Both parties had the opportunity to submit evidence up until the date of trial, and indeed both parties did exactly that. Defendant had both notice and opportunity to be heard regarding the issue of attorney's fees, and therefore cannot make a due process argument here.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Date: October 17, 2024

KEITH N. PUSAVAT
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

INTRODUCTION

This matter came on for regular hearing before this Workers' Compensation Judge. This matter has complex factual, medical, and legal histories and a detailed discussion of them is necessary to understand the rationale of the Findings in this case.

Applicant, a restaurant hostess, sustained a specific injury to her right index finger occurring on 04/06/2023 when a heavy restroom door closed on her fingertip and fractured it. The issue(s) before this Court pertain to Defendant's unilateral cancellation of a QME examination with a gastroenterologist and request for a replacement panel in orthopedics.

DISCUSSION

Issue No. 1: Replacement Panel Request

Title 8 Cal. Code of Regs. §31.5(a) provides that a replacement panel shall issue whenever one of sixteen enumerated grounds for replacement occurs. Defendant argues that it is entitled to a replacement QME panel for an appropriate specialty under Title 8 Cal. Code of Regs. §31.5(a)(10). The section reads as follows:

> (10) The Medical Director, upon written request, filed with a copy of the Doctor's First Report of Occupational Injury or Illness (Form DLSR 5021 [see 8 Cal. Code Regs. §§ 14006 and 14007]) and the most recent DWC Form PR-2 ("Primary Treating Physician's Progress Report" [See 8 Cal. Code Regs. § 9785.2]) or narrative report filed in lieu of the PR-2, determines after a review of all appropriate records that the specialty chosen by the party holding the legal right to designate a specialty is medically or otherwise inappropriate for the disputed medical issue(s). The Medical Director may request either party to provide additional information or records necessary for the determination.
>
> In this case, Applicant sustained injury to the right index finger, but obtained a QME panel in the specialty of internal medicine (gastroenterology) [Applicant's Exhibit 2].

The Defendant wrote to Applicant's counsel objecting to the selected specialty [Applicant's Exhibit 2] and requesting that no internal medicine

PQME be scheduled until the dispute over specialty was resolved. Defendant also requested a replacement panel from the Medical Unit on 03/20/2024 [Defendant's Exhibit A].

The Medical Director responded on 04/30/2024 by writing to Applicant's counsel and providing an opportunity to submit additional information. [Defendant's Exhibit C]. In response, Applicant's counsel apparently did not submit any additional information to the Medical Unit, but scheduled a PQME exam with internist Dr. Rahban for 05/21/2024 [Applicant's Exhibit 1].

It does not appear from the record that the Medical Director has ever issued a determination of whether the selected specialty is inappropriate.

The Court is therefore left with minimal medical evidence to decide the issue of appropriateness of the QME specialty, namely, a single report from PTP Dr. Sabbag dated 9/27/23. [Joint Exhibit 1]. The report is silent about internal complaints, or course of medication over the Applicant's five month course of surgery and therapy which may have caused such complaints.

Judicial notice is taken of the pleadings in this matter, including Applicant's Declaration of Readiness to Proceed and Petition for Penalties, in which Applicant's counsel represents under oath that the PTP has recommended referrals to other specialties. It is noted that the actual reports containing these referrals were not included in the submitted evidence before the Court.

Judicial notice is also taken on the Minutes of Hearing dated 05/13/2024, in which the Court noted that a gastro PQME exam had been scheduled, and took the matter off calendar at Defendant's request.

Judicial notice is also taken of the Petition for Emergency Stay, in which Defendant argues that the matter should be stayed pending a determination of the Medical Unit on the issue of appropriateness of the selected specialty.

This appears to be a finger injury case with minimal residual orthopedic disability after corrective surgery, with the possibility of some other issues as a result of the injury and/or medication. The Court notes that this is not yet a question of additional panels, but of the initial panel, and it appears that Applicant met the procedural requirements for selection of the initial panel specialty.

The record needs to be developed on the question of internal injury, and that is exactly what an internist PQME will do. Based on a review of the pleadings and medical report in this matter, there is insufficient evidence to find that the selected specialty is inappropriate, and the court does not find good cause for a replacement QME.

Issue No. 2: QME Cancellation and Emergency Stay

The procedure for proper cancellation of a QME examination is set forth in Title 8 Cal. Code of Regs. §34(h). The section reads as follows:

> (h) An appointment scheduled with an evaluator, whether an AME, Agreed Panel QME or QME shall not be cancelled or rescheduled by a party or the party's attorney less than six (6) business days before the appointment date, except for good cause. Whenever the claims administrator, or if none the employer, or the injured worker, or either party's attorney, cancels an appointment scheduled by an evaluator, the cancellation shall be made in writing, state the reason for the cancellation and be served on the opposing party. Oral cancellations shall be followed with a written confirming letter that is faxed or mailed by first class U.S. mail within twenty four hours of the verbal cancellation and that complies with this section. An injured worker shall not be liable for any missed appointment fee whenever an appointment is cancelled for good cause. The Appeals Board shall retain jurisdiction to resolve disputes regarding whether an appointment cancellation by a party pursuant to this subdivision was for good cause.

It is a simple exercise to see that the Defendant's cancellation confirmation notice dated 05/17/2024 [Applicant's Exhibit 9] is less than six business days prior to the scheduled appointment on 05/21/2024, and was therefore untimely, absent a showing of good cause.

The next question is whether good cause was demonstrated to cancel the appointment. As discussed above, the record does need to be developed with respect to Applicant's allegations of internal complaints. The Court finds that there was no good cause for a party to unilaterally cancel a QME examination. The Court notes that the cancellation was done before Defendant sought a stay of the proceedings, and that the better practice would have been to seek the stay first, or to set the issue for trial from the MSC of 05/13/2024, and then cancel the appointment if the Court found good cause or closed discovery. Instead, Defendant assumed good cause without a determination of the Court, and after

the Court had taken the matter off calendar for further discovery noting in the Minutes of Hearing that a gastro PQME had been scheduled.

Defendant also asserted a right to relief under its Emergency Petition for Stay. Title 8 Cal. Code of Regs. §10530(d)(3) allows the Court to set the matter for hearing without an immediate ruling on the petition, as was done here. The mere filing of an emergency petition does not guarantee immediate adjudication of the petition. As discussed herein, the Court's real concern is that the issue of the Emergency Petition, appropriateness of the PQME specialty, could have been heard or set before cancelling the QME exam, avoiding unnecessary delay in these proceedings.

Issue No. 3: Frivolous/Bad Faith Actions, Penalties

The unilateral QME cancellation was improper, as detailed above. The Court recognizes that Defendant made several efforts to meet and confer with Applicant's counsel to resolve the issue, and filed appropriate pleadings to get its objection adjudicated, and therefore will not sanction the Defendants. But Defendant should have requested to set the panel issues for Trial from the MSC to close discovery, rather than subsequently assuming good cause would be found for the untimely unilateral cancellation. While at first glance that internal medicine/ gastroenterology might seem a questionable choice for evaluation of a finger crush injury, Applicant had the right to select the specialty being first in time, and Defendant had the opportunity to set the matter for trial prior to deciding on a unilateral cancellation. Defendant therefore acted without good cause, resulting in unnecessary delay and expenses being incurred.

The Court therefore awards attorney's fees against Defendant, for proceedings related to the cancellation of the QME exam and Emergency Stay request, in an amount to be adjusted by the parties.

Date: September 11, 2024

KEITH N. PUSAVAT
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE