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

**HEATHER TILLER KELLEY, *Applicant***

**vs.**

**SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, permissibly self-insured, *Defendants***

**Adjudication Number: ADJ18027061**
**Sacramento District Office**

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

Applicant seeks reconsideration of the March 20, 2025 Findings of Fact and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed during the cumulative injury period ending May 18, 2023, sustained industrial injury to her low back. The WCJ found, in relevant part, that applicant's primary treating physician (PTP) Mark Zuber, D.C., did not establish a treatment relationship with applicant, nor did secondary treating physicians Adrienne Pasek, Psy.D., and Kasra Massumi, M.D. The WCJ further determined that the comprehensive medical-legal reports from these physicians were obtained in violation of Labor Code[1] section 4062.2(a). The WCJ ordered the reports excluded from evidence and barred their submission to properly selected Agreed or Qualified Medical Evaluators (QMEs).

Applicant contends the sole issue submitted for decision at trial was whether the treating reports of her physicians could be sent to appropriate QMEs, and that the WCJ erred by making substantive determinations on legal issues not submitted for decision at trial. Applicant asserts she complied with the requirements of section 4062.3(b) and should be allowed to submit the reporting from her treating physicians to a QME. Applicant further contends that defendant's initial denial of her claim effectively relinquished control over medical treatment and that following defendant's

[1] All further references are to the Labor Code unless otherwise noted.

subsequent partial acceptance of the claim, defendant never sought to effectuate a transfer of care into a Medical Provider Network (MPN). Accordingly, applicant contends that she rightfully selected her treating physicians and their reporting is admissible and may be submitted to the QME.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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 discussed below, we will grant applicant's petition, and applying the removal standard, rescind the F&O and substitute new orders that the reports of applicant's treating physicians may be sent to evaluating QMEs.

## FACTS

Applicant claimed injury to her back, neck, stress, "multiple body parts," including stroke, brain, head, face, speech, bilateral upper extremities, bilateral lower extremities, circulatory and nervous systems, while employed by defendant Sacramento Unified School District from May 1, 2001 to May 18, 2023.

On August 9, 2023, defendant denied all liability for applicant's claim and requested a panel of QMEs in orthopedic surgery pursuant to section 4060. (Ex. 1, Defense Denial Letter and Panel Request, dated August 9, 2023.)

On August 24, 2023, the Division of Workers' Compensation Medical Unit issued a panel of orthopedic QMEs under panel number 7614316.

On August 25, 2023, defendant issued its Answer to applicant's claim, and in relevant part, denied injury arising out of and in the course of employment. (Exhibit 10, Answer, dated August 25, 2023.)

On January 25, 2024, applicant designated "Disabled Workers' Advocate" as her PTP under section 4600. (Ex. 3, Primary Treating Physician Designation Letter, dated January 25, 2024.)

On January 30, 2024, defendant objected to the designation and declined to authorize the designated PTP. (Ex. L, Change of Treater Objection, dated January 30, 2024.)

On March 27, 2024, defendant admitted liability for the low back only. (Ex. H, Claim Acceptance Letter, dated March 27, 2024.)

On April 19, 2024, applicant designated Mark Zuber, D.C., as her primary treating physician pursuant to section 4600. (Ex. 2, Primary Treating Physician Designation Letter, dated April 19, 2024.)

On April 27, 2024, defendant objected to the PTP designation on the grounds that Dr. Zuber did not have offices in California and requested that applicant "select a physician in the Sacramento area who might be able to provide necessary treatment." (Ex. A, Objection to Change of Treating Physician, dated April 27, 2024.)

On May 14, 2024, Dr. Zuber issued a "Primary Treating Physician's Initial and PR-4 Permanent and Stationary Comprehensive Medical Legal Evaluation and Report." (Ex. 5, Report of Mark Zuber, D.C., dated July 12, 2024.)

On July 12, 2024, defendant objected to the report of Dr. Zuber on the grounds that "it appears to be a QME report," and that the report was obtained pursuant to section 4064(d). (Ex. B., Objection to Report of Mark Zuber, D.C., dated July 12, 2024.)

On September 2, 2024, Adrienne Pasek, Psy.D., issued a "Secondary Treating Physician's Initial and PR-4 Permanent and Stationary Comprehensive Medical Legal Evaluation and Report" in the specialty of psychology. (Ex. 6, Report of Adrienne Pasek, Psy.D., dated September 2, 2024.)

On October 1, 2024, Kasra Maasumi, M.D., issued a "Secondary Treating Physician's Initial and PR-4 Permanent and Stationary Comprehensive Medical Legal Evaluation and Report" in the specialty of neurology/internal medicine. (Ex. 7, Report of Kasra Maasumi, M.D., dated October 1, 2024.)

The parties thereafter selected Pramila Gupta, M.D., as the QME in neurology, and a dispute arose regarding whether the reports of applicant's treating physicians would be submitted for review by Dr. Gupta. (See Exs. 8 & 9, Email Correspondence, dated December 2, 2024.)

On March 4, 2025, the parties proceeded to trial on the primary issue of the records to be submitted to QME Dr. Gupta. Neither party offered witness testimony, and the WCJ ordered the matter submitted for decision the same day.

On March 20, 2025, the WCJ issued the F&O, determining in relevant part that neither applicant's purported PTP Dr. Zuber, nor her purported secondary treating physicians Dr. Pasek

or Dr. Maasumi, established a treatment relationship with applicant. Accordingly, the comprehensive medical-legal reports of all three physicians were obtained in violation of section 4062.2(a). (Finding of Fact No. 8.) The WCJ ordered, in relevant part, that the reports from Drs. Zuber, Pasek and Maasumi be excluded from evidence, and further ordered that the reports not be sent to any properly selected QME or AME. (Order No. 1.)

The WCJ's Opinion on Decision observes that applicant's selections of a "chiropractor in Texas as a Primary Treating Physician and requesting a medical-legal report with no actual treatment relationship between Applicant and the doctor is found be an attempt to circumvent the statutory limitation expressly created by section 4062.2." (Opinion on Decision, at p. 4.) The WCJ similarly found that the reports of secondary treating physicians Drs. Pasek and Maasumi did not reflect an actual treatment relationship with applicant and were medical-legal reports obtained outside the dispute resolution process required under section 4062.2. (*Ibid*.)

Applicant's Petition contends the WCJ's analysis necessarily decides issues that were not framed for decision at trial. (Petition, at p. 12:7.) In the alternative, applicant contends that she appropriately selected treating physicians following defendant's denial of her claim, and that reports of treating physicians are expressly admissible pursuant to section 4060(b) and 4061(i). (*Id.* at p. 13:17.)

The WCJ's Report observes that applicant did not prove by a preponderance of the evidence that Drs. Zuber, Pasek and Maasumi met the standards described in Administrative Director Rule 9785 (Cal. Code Regs., tit. 8, § 9785) for primary and secondary treating physicians. (Report, at p. 3.)

## DISCUSSION

### I.

Former 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, 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 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."

Here, according to Events, the case was transmitted to the Appeals Board on April 14, 2025, and 60 days from the date of transmission is June 13, 2025. This decision is issued by or on June 13, 2025, so that we have timely acted on the petition as required by section 5909(a).

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. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 14, 2025, and the case was transmitted to the Appeals Board on April 14, 2025. 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 14, 2025.

**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.

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 of employment and injury arising out of and in the course of employment. These are final orders subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].)

Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding and order regarding the reporting that may be submitted to a QME. Therefore, we will apply the removal standard to our review. (See *Gaona, supra,* 5 Cal.App.5th 658, 662.)

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 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).)

The WCJ has determined that applicant's primary treating physician and two secondary treating physicians have not established a treatment relationship with applicant and were obtained in violation of section 4062.2. Accordingly, the WCJ has disallowed the submission of the reports of Drs. Zuber, Pasek and Maasumi to neurological QME Dr. Gupta and any subsequent AME or QMEs. Applicant contends she has followed the requirements of section 4062.3(b), and that the reports may be submitted to the QME for review.

Section 4600 requires the employer to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).) If an employer has established an MPN, injured workers are generally limited to treating with a physician from within the employer's MPN. (Lab. Code, §§ 4600(c), 4616 et seq.) However, if the employer neglects or refuses to provide reasonably necessary medical treatment, whether through an MPN or otherwise, then an injured worker may self-procure medical treatment at the employer's expense. (Lab. Code, § 4600(a); *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82 [31 Cal.Comp.Cases 93] ["the employer is required to provide treatment which is reasonably necessary to cure or relieve the employee's distress, and if he neglects or refuses to do so, he must reimburse the employee for his expenses in obtaining such treatment"].)

Here, defendant denied liability for applicant's claim on August 9, 2023. (Ex. 1, Defense Denial Letter and Panel Request, dated August 9, 2023.) Accordingly, defendant relinquished any claim of medical control, and applicant was entitled to self-procure her medical treatment through a physician of her choosing. As our Supreme Court observed in *McCoy, supra:*

> It is settled that the employee is entitled to reimbursement for self-procured care when the employer has notice of the injury but fails to tender treatment promptly, and in such a case the employee is not required to request his employer for medical attention. [Citations.] The rationale of these cases is that notice of injury provides the employer with the opportunity to render medical assistance and if he fails to avail himself of the opportunity promptly, he has neglected to provide treatment within the meaning of section 4600.

(*McCoy, supra,* 64 Cal.2d at p. 96)

Applicant was therefore entitled to self-procure medical treatment through her private health insurance and the WCJ has determined that the resulting treatment records from Kaiser

Permanente may appropriately be submitted to the QME. (F&O, Order No. 2.) The WCJ's decision in this respect is not challenged by any party.

On March 27, 2024, defendant admitted liability for the low back only. (Ex. H, Claim Acceptance Letter, dated March 27, 2024.) However, the record contains no evidence of an offer of medical treatment to the applicant for her now admitted injury pursuant to section 4600(a). (Lab. Code, § 4600.) Nor does the record contain evidence of an applicable Medical Provider Network (MPN) or notice that defendant sought to transfer applicant's care into an MPN pursuant to Administrative Director Rule 9767.9. (Cal. Code Regs., tit. 8, § 9767.9.)

Applicant designated Dr. Zuber as her primary treating physician pursuant to section 4600 on April 19, 2024. (Ex. 2, Lab. Code section 4600 Primary Treating Physician Designation of Mark Zuber, D.C., dated April 19, 2024.)

On April 27, 2024, defendant objected to the designation on the grounds that the physician was "geographically inappropriate." (Ex. A, Objection to Change of Treating Physician, dated April 27, 2024.) Defendant's letter did not cite to a statutory or other legal basis for its geographic objection. Importantly, defendant once again made no offer of medical treatment on an admitted injury claim. Rather, defendant urged applicant to "select a physician in the Sacramento area who might be able to provide necessary treatment." (*Ibid*.)

The Appeals Board is broadly authorized to consider "[r]eports of attending or examining physicians." (Lab. Code, § 5703(a); *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].) Section 4064(d) provides that no party is prohibited from obtaining *any* medical evaluation or consultation at the party's own expense, and that *all* comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in specified statutes. (Lab. Code, § 4064(d); *Valdez*, *supra*, at p. 1239.) Section 4062.3(a) further provides that any party may provide to the QME, subject to the restrictions set forth in the statute, any records prepared or maintained by the employee's treating physician or physicians and medical and nonmedical records relevant to determination of the medical issue. (Lab. Code, § 4062.3(a).) Moreover, section 4061(i) specifically provides for the admissibility of treating physician reporting in proceedings before the WCAB regarding the existence of extent of permanent impairment. (Lab. Code, § 4061(i).)

It is also well-established that an injured worker is free to request a comprehensive medical-legal report from a treating physician necessary to address contested issues, including the nature and extent of the injury, so long as the expense was reasonably necessary at the time incurred, and if the cost incurred was reasonable. (Lab. Code, §§ 4620 et seq.; 5307.6; *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal. Wrk. Comp. LEXIS 69] (Appeals Board en banc).)

Here, applicant was entitled to self-procure and direct her own medical treatment to cure or relieve from the effects of her injuries following defendant's denial of all liability for her injuries. (*McCoy, supra,* 64 Cal.2d 82.) Even after defendant admitted injury to the low back, defendant made no offer of medical treatment and offered no advice as to the existence of an MPN or how to access the MPN. Applicant obtained medical evaluation and treatment from primary and secondary treating physicians, with the resulting reporting served on defendant more than 20 days prior to a scheduled QME evaluation. (Lab. Code, § 4062.3(b).)

The weight accorded the evidence, including the weighing of medical-legal reporting in evidence, is a matter to be determined by the WCJ and by the Appeals Board. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312. 317 [35 Cal.Comp.Cases 500]; *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436, 440 [33 Cal.Comp.Cases 656].) All parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. (Lab. Code, § 3202.5.)

Based on the Appeals Board's broad authority to consider reports of evaluating physicians and to accord to those reports their appropriate evidentiary weight, and because applicant has appropriately obtained treating physician reports pursuant to section 4600(a) and complied with section 4062.3(b), we are persuaded that the reporting of applicant's primary and secondary treating physicians may be submitted to the QME. (Lab. Code, § 4062.3(a)(1); see also *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1811 (Appeals Board en banc).)

Accordingly, we will grant applicant's petition, and applying the removal standard, rescind the March 20, 2025 F&O. We will affirm the WCJ's Finding of Fact that defendant partially admitted applicant's claim of injury on March 27, 2024. We will also affirm the WCJ's order that the records from Kaiser Permanente may be submitted to Qualified and Agreed Medical Evaluators. Finally, we will substitute new orders that that the reporting of applicant's primary and

secondary treating physicians is admissible and may be submitted to properly selected Agreed and Qualified Medical Evaluators for review.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the decision of March 20, 2025 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 20, 2025 Findings of Fact and Orders is **RESCINDED,** with the following **SUBSTITUTED** therefor:

## FINDINGS OF FACT

1. Applicant Heather Tiller Kelly claimed injury to her back, neck, stress, "multiple body parts," including stroke, brain, head, face, speech, bilateral upper extremities, bilateral lower extremities, circulatory and nervous systems, while employed by defendant Sacramento Unified School District from May 1, 2001 to May 18, 2023.
2. Defendant accepted applicant's claim of injury to her low back only on March 27, 2024. Defendant denies liability for all other claimed body parts.

## ORDERS

a. The reports of Mark Zuber, M.D., Adrienne Pasek, Psy.D., and Kasra Maasumi, M.D., are admissible in evidence, and may be submitted to properly selected Qualified and Agreed Medical Evaluators.
b. Applicant's medical records from Kaiser Permanente may be submitted to properly selected Qualified and Agreed Medical Evaluators.

**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**

**June 10, 2025**

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

**HEATHER TILLER KELLEY**
**NYMAN TURKISH**
**HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

**SAR/abs**

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