

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

SHIVANI SARIN, *Applicant*

vs.

**MOTION PICTURE AND TELEVISION FUND;
SAFETY NATIONAL CASUALTY CORP. administered by
BETA HEALTHCARE GROUP, *Defendants***

**Adjudication Number: ADJ18397268
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration or in the alternative removal of the Findings of Fact of October 15, 2024, wherein the workers' compensation judge (WCJ) found that defendant agreed to use Gabriel Rubanenko, M.D., from applicant's prior case as the panel qualified medical evaluator (PQME) in the instant case. Defendant contends that it never agreed to Dr. Rubanenko as the PQME in this case.

We have received an Answer from applicant. 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/Removal, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny defendant's Petition for Reconsideration/Removal.

FACTS

Applicant, while employed during the period of September 23, 2019 to December 1, 2022, as a Nurse Aide, Occupation Group No. 340, by defendant, claims to have sustained injury arising out of and in the course of employment to wrists, knees, GERD, sleep, anxiety, depression, and gait. Defendant denied this claim on November 15, 2023. (Def. Ex. A, Notice of Denial of Claim dated 11/15/23, p. 1.)

Applicant's previous claim for a specific injury was resolved by a Stipulated Award on July 29, 2022, in case ADJ11828509. Orthopedic surgeon Dr. Rubanenko was the PQME in that earlier specific injury case. On September 18, 2023, applicant filed a Petition to Reopen stating that her knee injury had worsened and she needed surgery.

On April 16, 2024, defendant sent a letter to Dr. Rubanenko requesting a PQME evaluation in relation to both claims. (App. Ex. 1, DA Advocacy letter to Dr. Rubanenko dated 4/16/24, pp. 1-4.) The letter contained both case numbers in the caption. (App. Ex. 1, p. 1.) On April 23, 2024, defendant sent a letter to Dr. Rubanenko, scheduling the PQME evaluation for April 29, 2024, for both cases. (App. Ex. 3, Dr. Rubanenko, PQME, Ortho Re-Evaluated dated 4/29/24, p. 54.) Dr. Rubanenko provided a QME report dated April 29, 2024, in relation to both cases. (App. Ex. 3, p. 1.)

Defendant objected to Dr. Rubanenko's April 24, 2024 PQME report by letter dated May 30, 2024. (App. Ex. 2, Defendant Objection to Dr. Rubanenko Report dated 5/30/25, p. 1.) Defendant stated "We are in receipt of the QME report of Dr. Gabriel Rubanenko, MD, for evaluation on 04/29/2024. Defendant hereby objects to Dr. Rubanenko's report. We are in disagreement with the report and the physician's findings. We reserve the right to set the QME's cross-examination and/or the right to seek supplemental reporting." (App. Ex. 2, p. 1.)

Defendant requested a PQME panel on May 29, 2024. (Def. Ex. C, Panel List No. 7698399 dated 5/29/24, pp. 1-2.) Defendant struck one doctor from the panel, only indicating the case number for the specific injury on its letter (Def. Ex. E, Defendant's Panel Strike Letter dated 6/5/25, p. 1) and applicant struck another doctor from the panel and listed both case numbers on her letter. (Def. Ex. D, Applicant Attorney's Panel Strike Letter dated 6/7/24, p. 1.) On August 5, 2024, defendant sent a notice to the remaining panelist, Orthopedic Surgeon Dr. Robert Samon that he was scheduled to perform his evaluation of applicant on September 10, 2024. (Def. Ex. F, Notice of QME Evaluation with Dr. Robert Samson dated 8/5/25, p. 1.)

On July 17, 2024, applicant filed a Petition to Quash and Invalidate Panel #7698399, contending that Dr. Rubanenko was already chosen as the PQME in this case. On August 7, 2024, defendant filed its Objection to Petition to Quash and Invalidate Panel #7698399.

On September 3, 2024, a hearing was held on the issues of whether defendant is entitled to a PQME panel on the claimed cumulative injury for ADJ18397268 and whether defendant agreed to use PQME Dr. Rubanenko to address both the new and further on case number ADJ18397268

and the claimed cumulative injury on case number ADJ18397268. (9/3/24 Expedited Minutes of Hearing (MOH), pp. 1-4.) There was no testimony at the hearing and the WCJ admitted exhibits from both parties. (9/3/24 MOH, pp. 2-4.)

On October 15, 2024, the WCJ issued Findings of Fact that defendant agreed to use PQME Dr. Rubanenko from ADJ11828509 in the instant case. (10/15/24, Findings of Fact, Finding no. 3.)

DISCUSSION

I.

Former Labor Code¹ 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 November 13, 2024, and 60 days from the date of transmission is Sunday, January 12, 2025. The next business day that is 60 days from the date of transmission is Monday, January 13, 2025.

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

(See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, January 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 November 13, 2024, and the case was transmitted to the Appeals Board on November 13, 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 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 November 13, 2024.

II.

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.

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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 a finding regarding a threshold issue, the employment relationship. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision, the selection of the PQME Dr. Rubanenko. 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 upon the WCJ's analysis of the merits of the petitioner's arguments, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and that reconsideration will not be an adequate remedy. Furthermore, defendant agreed to Dr. Rubanenko as the PQME, and Dr Rubanenko already issued his PQME Report based on this agreement. (App. Ex. A, pp. 1-4; App. Ex. 3, p. 1.) Therefore, defendant cannot choose a different PQME at such a late stage of the QME process.

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 A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 13, 2025

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

**SHIVANI SARIN
TELLERIA, TELLERIA & LEVY, LLP
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP**

JMR/mc

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