

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. OAK 0328271**

4 **NELLY ROMERO,**

5 *Applicant,*

6 **vs.**

7 **COSTCO WHOLESALE, permissibly self-**
8 **insured,**

9 *Defendant.*

**OPINION AND ORDER
DENYING REMOVAL**

10
11 Defendant seeks removal to the Appeals Board from the Order issued by the workers'
12 compensation administrative law judge (WCJ) on October 2, 2006. In that order, the WCJ found
13 that applicant sustained an admitted industrial injury to her neck and upper extremities while
14 employed by defendant as a cashier during a period through September 4, 2005. In relevant part,
15 the WCJ further found that the prior qualified medical evaluator (QME) panel, which consisted of
16 three medical doctors and was issued by the Division of Workers' Compensation's Medical Unit
17 (medical unit) while applicant was not represented by an attorney, has become inappropriate to
18 resolve the parties' dispute over medical treatment recommended by applicant's treating physician
19 because applicant, now represented by an attorney, wants to select from a new QME panel
20 consisting of chiropractors. Accordingly, the WCJ ordered the medical unit to issue a new QME
21 panel, comprised of three chiropractors.

22 Defendant contends that the WCJ erred in ordering a new panel to be issued and, instead,
23 that applicant should be evaluated by the QME, Peter Salamon, M.D., an orthopedic surgeon, that
24 defendant selected from the prior panel. Defendant argues that it properly followed the procedure
25 set forth in Labor Code sections 4062 and 4062.1¹ for obtaining a panel QME while applicant was
26 not represented by an attorney and that applicant is not entitled to a new QME panel now that she

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¹ All further statutory references are to the Labor Code.

1 is represented by an attorney.

2 Applicant filed an answer to defendant's petition for removal.

3 I.

4 We have considered the allegations raised in defendant's petition and applicant's answer
5 thereto, as well as the content of the WCJ's Report and Recommendation.

6 We hold, for purposes of sections 4062.1(e) and 4062.2(e), that an employee has
7 "received" a comprehensive medical-legal evaluation when the employee attends and participates
8 in the medical evaluator's examination. Here, although a QME panel issued while applicant was
9 unrepresented, and defendant selected a physician from that panel, applicant never attended and
10 participated in an examination by that physician. Accordingly, we will deny removal and, thereby,
11 affirm the WCJ's order for a new QME panel.

12 II.

13 The relevant facts do not appear to be disputed.

14 Applicant sustained an admitted industrial injury to her neck and upper extremities while
15 employed by defendant as a cashier during a period through September 4, 2005, as the cumulative
16 result of her work duties.

17 While applicant was not represented by an attorney, her treating physician issued a report
18 recommending physical therapy, including pool therapy. Defendant objected to the requested
19 medical treatment, pursuant to section 4062, and advised applicant in writing of the applicable
20 procedure to resolve the dispute. When defendant did not receive a response to its objection, it
21 requested that the medical unit issue a QME panel comprised of three medical doctors. The
22 medical unit, on May 22, 2006, issued the QME panel.

23 Meanwhile, on May 18, 2006, applicant became represented by an attorney. The parties
24 attempted, unsuccessfully, to select an agreed medical evaluator and, when no agreement was
25 reached, defendant subsequently scheduled an appointment for applicant's examination by Dr.
26 Salamon, an orthopedic surgeon it selected from the QME panel.

27 Applicant, in the interim, selected a different treating physician, a chiropractor, and

1 asserted that she is entitled to a new QME panel, compromised of chiropractors rather than
2 orthopedic surgeons, to resolve the parties' medical treatment dispute. When the medical unit
3 declined to issue a new panel as requested by applicant, she petitioned the Appeals Board for
4 permission to obtain a new panel. The WCJ, subsequently, issued the disputed October 2, 2006,
5 Order requiring the medical unit to issue a new QME panel, comprised of three chiropractors.

6 III.

7 Section 4062, subdivision (a), provides, in relevant part:

8 "If either the employee or employer objects to a medical
9 determination made by the treating physician ... the objecting party
10 shall notify the other party in writing of the objection within 20
11 days of receipt of the report if the employee is represented by an
12 attorney or within 30 days of receipt of the report if the employee
13 is not represented by an attorney. ... If the employee is represented
14 by an attorney, a medical evaluation to determine the disputed
15 medical issue shall be obtained as provided in Section 4062.2, and
16 no other medical evaluation shall be obtained. If the employee is
not represented by an attorney, the employer shall immediately
provide the employee with a form prescribed by the medical
director with which to request assignment of a panel of three
qualified medical evaluators, the evaluation shall be obtained as
provided in Section 4062.1 and no other medical evaluation shall
be obtained."

17 In turn, section 4062.1 provides, in relevant part:

18 "(a) If an employee is not represented by an attorney, the
19 employer shall not seek agreement with the employee on an agreed
20 medical evaluator, nor shall an agreed medical evaluator prepare
the formal medical evaluation on any issues in dispute.

21 "(b) If either party requests a medical evaluation pursuant to
22 Section 4060, 4061, or 4062, either party may submit the form
23 prescribed by the administrative director requesting the medical
24 director to assign a panel of three qualified medical evaluators in
25 accordance with Section 139.2. However, the employer may not
26 submit the form unless the employee has not submitted the form
within 10 days after the employer has furnished the form to the
employee and requested the employee to submit the form. The
party submitting the request form shall designate the specialty of
the physicians that will be assigned to the panel.

1 “(c) Within 10 days of the issuance of a panel of qualified medical
2 evaluators, the employee shall select a physician from the panel to
3 prepare a medical evaluation, the employee shall schedule the
4 appointment, and the employee shall inform the employer of the
5 selection and the appointment. If the employee does not inform
6 the employer of the selection within 10 days of the assignment of a
7 panel of qualified medical evaluators, then the employer may
8 select the physician from the panel to prepare a medical evaluation.

9 ...

10 “(d) The evaluator shall give the employee, at the appointment, a
11 brief opportunity to ask questions concerning the evaluation
12 process and the evaluator’s background. The unrepresented
13 employee shall then participate in the evaluation as requested by
14 the evaluator unless the employee has good cause to discontinue
15 the evaluation. For purposes of this subdivision, “good cause”
16 shall include evidence that the evaluator is biased against the
17 employee because of his or her race, sex, national origin, religion,
18 or sexual preference or evidence that the evaluator has requested
19 the employee to submit to an unnecessary medical examination or
20 procedure. If the unrepresented employee declines to proceed with
21 the evaluation, he or she shall have the right to a new panel of
22 three qualified medial evaluators from which to select one to
23 prepare a comprehensive medical evaluation. If the appeals board
24 subsequently determines that the employee did not have good
25 cause to not proceed with the evaluation, the cost of the evaluation
26 shall be deducted from any award the employee obtains.

27 “(e) If an employee has received a comprehensive medical-legal
evaluation under this section, and he or she later becomes
represented by an attorney, he or she shall not be entitled to an
additional evaluation.”

Furthermore, section 4062.2 provides, in relevant part:

“(a) Whenever a comprehensive medical evaluation is required to
resolve any dispute arising out of an injury or a claimed injury
occurring on or after January 1, 2005, and the employee is
represented by an attorney, the evaluation shall be obtained only as
provided in this section.

“(b) If either party requests a medical evaluation pursuant to
Section 4060, 4061, or 4062, either party may commence the
selection process for an agreed medical evaluator by making a
written request naming at least one proposed physician to be the
evaluator. The parties shall seek agreement with the other party on
the physician, who need not be a qualified medical evaluator, to
prepare a report resolving the disputed issue. If no agreement is

1 reached within 10 days of the first written proposal that names a
2 proposed agreed medical evaluator, or any additional time not to
3 exceed 20 days agreed to by the parties, either party may request
the assignment of a three-member panel of qualified medial
evaluators to conduct a comprehensive medical evaluation. ...

4 [¶] ... [¶]

5 “(e) If an employee has received a comprehensive medical-legal
6 evaluation under this section, and he or she later ceases to be
7 represented, he or she shall not be entitled to an additional
evaluation.”

8 Therefore, section 4062.1 controls the procedure by which the parties may obtain a medical
9 evaluation to address a disputed issue pursuant to sections 4060, 4061, or 4062 when the employee
10 is not represented by an attorney, and section 4062.2 controls the procedure, for injuries and
11 alleged injuries occurring on or after January 1, 2005, when the employee is represented by an
12 attorney. Pursuant to subdivision (e) of those sections, an additional evaluation may not be
13 obtained when the employee either changes from being unrepresented by an attorney to being
14 represented or ceases being represented after previously having an attorney where the “employee
15 has *received* a comprehensive medical-legal evaluation” under either 4062.1 or 4062.2. (Emphasis
16 added.) We conclude that a comprehensive medical-legal evaluation is “received” when the
17 employee attends and participates in the medical evaluator’s examination.

18 Here, while applicant was unrepresented, defendant objected to her treating physician’s
19 recommendation for physical therapy and advised applicant in writing of the applicable procedure
20 to resolve the dispute. When defendant did not receive a response to its objection from applicant,
21 it requested and obtained from the administrative director a QME panel of medical doctors on May
22 22, 2006, pursuant to section 4062.1.

23 In the meantime, on May 18, 2006, applicant became represented by an attorney. The
24 parties attempted, unsuccessfully, to select an agreed medical evaluator and, when no agreement
25 was reached, defendant subsequently scheduled an appointment for applicant’s examination by Dr.
26 Salamon, an orthopedic surgeon it selected from the QME panel. However, because applicant had
27 not attended and participated in the examination by the panel QME when she changed from being

1 not represented by an attorney to being represented, she had not “received” a comprehensive
2 medical-legal evaluation pursuant to section 4062.1 and is, therefore, not precluded from
3 requesting a new QME panel pursuant to section 4062.2.

4 Therefore, the WCJ did not err in ordering the medical unit to issue a new QME panel
5 consisting of chiropractors, the specialty designated by applicant as the party submitting the
6 request for the panel, pursuant to section 4062.2. Accordingly, we will deny removal.

7 For the foregoing reasons,

8 **IT IS ORDERED** that removal from the Order of October 2, 2006, is **DENIED**.

9 **WORKERS’ COMPENSATION APPEALS BOARD**

10
11 /s/ R. G. Caplane

12
13 ***I CONCUR,***

14
15 /s/ Janice Jamison Murray

16
17
18 /s/ Joseph M. Miller

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

20 **6/14/2007**

21 **SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN BELOW:**

22 **JONATHAN BRAND, 1777 BOTELHO DR., #220, WALNUT CREEK, CA 94596**

23 **MULLEN & FILIPPI, 555-12TH ST., #2050, OAKLAND, CA 94607**

24 JSG/rrm
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