WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LORENZO BAHENA, ***Applicant,*** **vs.** **CHARLES VIRZI CONSTRUCTION; CALIFORNIA INSURANCE COMPANY, adjusted by APPLIED RISK SERVICES, INC.,** ***Defendants.***	**Case No. ADJ9417754** **(Los Angeles District Office)** **ORDER DENYING PETITION FOR REMOVAL**

We have considered the allegations of the Petition for Removal 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 stated in said report which we adopt and incorporate, we will deny removal.

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For the foregoing reasons,

IT IS ORDERED that said Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR,

MARGUERITE SWEENEY

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DEC 17 2014

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

APPLIED RISK
CALIFORNIA INSURANCE CO
CHARLES VIRZI CONSTRUCTION
JOAN SHEPPARD
LORENZO BAHENA
ROBIN JACOBS

ebc

WCAB CASE NO.: ADJ9417754

LORENZO BAHENA	**vs.**	**CHARLES VIRZI CONSTRUCTION; CALIFORNIA INSURANCE COMPANY c/o APPLIED RISK SERVICES, INC.**
JUDGE:		**DOUGLAS A. WATKINS**
DATE OF INJURY:		**March 30, 2013**

REPORT AND RECOMMENDATION ON DEFENDANT'S PETITION FOR REMOVAL

I.

INTRODUCTION

Defendant filed this timely, verified Petition for Removal, objecting to a Findings and Order dated October 15, 2014. It was found that the QME panel in the specialty of chiropractic was properly issued, and that the DCW Medical Unit should not issue a second panel in the specialty of orthopedic surgery. It was ordered that Applicant attend an evaluation by a chiropractor selected by the parties from the chiropractic panel pursuant to the procedures in Labor Code Section 4062.2.

For the reasons set forth herein, it is recommended that Defendant's petition be denied.

II.

STATEMENT OF FACTS

On April 25, 2014, Applicant filed an Application for Adjudication of Claim, alleging he sustained injury to his arm, wrist, chest, shoulders and knee arising out of and in the course of employment with Charles Virzi Construction on March 30, 2013.

Applicant began treating with a chiropractor, Edward Komberg, D.C. on March 24, 2014. Dr. Komberg referred Applicant to two orthopedic specialists, Scott Lewis Rosenzweig, M.D., and J. Timothy Katzen, M.D., for consultation.

On May 13, 2014, Defendant denied the claim on the grounds that it was filed more than one year after the alleged date of injury and there was no medical or factual evidence to support the claim. A fact sheet advising Applicant about the QME process (DWC Fact Sheet E) and a QME panel request form (QME Form 106) were enclosed with the denial letter. (Defendant's Exhibit A.)

On May 29, 2014, Applicant mailed the request for a QME panel to the DWC Medical Unit, requesting a panel in the specialty of chiropractic. The request included a copy of the denial letter.

On June 23, 2014, Defendant wrote to the Medical Unit objecting to Applicant's panel request on the grounds that Applicant did not provide evidence that a request for a medical evaluation pursuant to Section 4060 had been made. That same day, Defendant's attorney sent Applicant's attorney a letter stating that pursuant to Section 4060, a medical-legal evaluation in the specialty of orthopedic is necessary, and that if the parties cannot agree on an AME within 15 days Defendant will seek a QME panel.

On July 11, 2014, Defendant sent its own QME Form 106 to the Medical Unit requesting a panel in the specialty of orthopedic surgery. The Medical Unit rejected the request because the panel in chiropractic had already been issued.

On July 15, 2014, Applicant scheduled an evaluation with a chiropractor from the chiropractic panel, Phu Q. La, D.C.. Defendant objected to the evaluation.

At issue is whether Applicant's panel request was valid, and whether Applicant should attend the evaluation with Dr. La. Defendant contends the chiropractic panel

should be deemed invalid, and the Medical Unit should be ordered to issue a new panel in orthopedic surgery. This matter went to expedited hearing on August 25, 2014. A Findings and Order issued, finding that the chiropractic panel was properly issued, and ordering Applicant to attend an evaluation with a chiropractor from that panel. Defendant filed this petition in response.

III.

DISCUSSION

Removal is an extraordinary remedy that should only be granted upon a showing of significant prejudice or irreparable harm. *Swedlow v. Workers' Comp. Appeals Bd.*, (1983) 48 Cal. Comp. Cas 476; 8 Cal. Code Reg. §10843. Defendant will not suffer such prejudice or harm in this case if Applicant is evaluated by a QME in chiropractic instead of orthopedic surgery. Applicant's primary treating physician is Dr. Komberg, a chiropractor, so that is the appropriate specialty for the QME evaluation.

Notwithstanding the above, the undersigned believes Defendant's petition should be denied on the merits. Although the procedure for requesting a QME panel under Sections 4060 and 4062.2 for represented employees is ambiguous, it is felt that Applicant's request was in compliance with the statutes as discussed below.

Medical Evaluations Under Labor Code Sections 4060 and 4062.2:

Section 4060 applies to disputes over compensability (i.e., where the entire claim is denied), and addresses the process for obtaining a medical evaluation to determine compensability. Subsection (c), which refers to employees who are represented by an attorney, states that the medical evaluation shall be obtained through the procedure provided in Section 4062.2.

Section 4062.2(b), as it relates to Section 4060 cases, states, "No earlier than the first working day that is at least 10 days after the date of mailing of *a request for a medical evaluation pursuant to Section 4060* . . . either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation." (Emphasis added.)

The ambiguity arises because Section 4060(c) makes no reference to a "request for a medical evaluation". Thus, it is not clear what triggers the 10-day waiting period that must expire before a party may request a QME panel in represented employee cases. This case presents two possible interpretations.

As Defendant notes, Section 4062.2(b) was amended in 2012 as part of SB 863. Prior to the amendment, it provided that any party seeking to obtain a medical evaluation pursuant to Section 4060 was required to first make a written request on the opposing party naming at least one proposed physician to be an agreed medical evaluator. If no agreement on an AME was reached within 10 days (or additional time not to exceed 20 days) either party could then request assignment of a three-member panel of qualified medical evaluators. Typically, the party sending the AME proposal letter included language that if no agreement was reached within 10 days, a QME panel would be requested, though that language was not required by the statute.[1]

Defendant contends that even though the requirement that the parties attempt to agree on an AME was eliminated from Section 4062.2, the requirement that a party seeking a QME panel first send a letter to the other party, and then wait 10 days before

[1] It was not uncommon also for parties to include in the letter language that the party proposing the AME objects to the findings of the primary treating physician. That language was not required for Section 4060 cases.

requesting the panel, remained. This correspondence would not be a "request" per se, but would be a notification of that party's intention to request a panel in 10 days.

It appears Defendant's position is the prevailing view among workers' compensation practitioners, and is supported by the DWC website. However, there are two flaws with this argument. First, Section 4062.2(b) specifically refers to a request for a medical evaluation *pursuant to Section 4060* and there is nothing in Section 4060 about a party notifying the other of its intention to request a QME panel before making the request. If the Legislature had intended to include such a requirement in the statute it could have done so. Second, there is no indication that when the requirement in Section 4062.2 about proposing an AME was removed the Legislature intended to retain (or replace it with) the provision that the party seeking the evaluation notify the other party of its intention to request a QME panel. In fact, the legislative history of SB 863 suggests the Legislature may have intended to do away with the requirement for a second letter after the denial letter in represented employee cases before a QME panel can be requested. That argument is discussed more fully below.

The other possibility is that the "request for a medical evaluation pursuant to Section 4060" refers to the notice in Section 4060(d) whereby the employer notifies the employee either that the employer requests a comprehensive medical evaluation to determine compensability or that the employer has not accepted liability and the employee may request a comprehensive medical evaluation to determine compensability. The form for requesting a QME panel must accompany the notice per subsection (e). Also, when a claim is denied the employer must provide the DWC pamphlet "QME/AME Fact Sheet" explaining how to request a QME evaluation. 8 Cal. Code Reg. §9812(i). The fact sheet provides that the employee may request a QME

exam upon receipt of the denial letter and accompanying forms, and if the employee does not submit the request form to the DWC Medical Unit within 10 days, the employer may do so. There is no requirement that either party send a letter to the other notifying it of its intention to request a QME panel before making the request.

There are two flaws with this argument as well. First, Section 4060(d) refers to a notice regarding how to request a QME panel, not a request for the evaluation itself. But that is true for the letter Defendant contends initiates the 10-day waiting period as well. That letter is not a request either, but is merely a notification of a party's intention to request a panel in 10 days. Second, Section 4060(d) specifically refers to unrepresented employees. However, the notice outlining the procedure for requesting a QME panel must be provided with all denial letters, whether the employee is represented or not per Regulation §9812(i). (DWC Fact Sheet E was enclosed with Defendant's denial letter in this case. See Defendant's Exhibit A.)

As noted above, the legislative history of SB 863 may shed some light on the Legislature's intent in amending these statutes. SB 863 was introduced on February 18, 2011, and was amended on August 24, 2012 to include the changes to Sections 4060 and 4062.2(b). The analysis accompanying that amended version states,

> ". . . Existing law establishes procedures for the resolution of disputes regarding the compensability of an injury. . . Existing law prescribes a specific procedure that governs dispute resolution relating to injuries occurring on or after January 1, 2005, when the employee is represented by an attorney. This procedure includes various requirements relating to the selection of agreed medical evaluators. . . This bill would revise and recast these provisions."

SB 863 was passed by the Senate and the Assembly on August 31, 2012. The bill analysis of the Senate Rules Committee, dated August 30, 2012, states that this bill, "streamlines the AME and QME process to eliminate unnecessary delays and friction in the system."

The foregoing comments indicate that the changes enacted by SB 863 to the process of obtaining a comprehensive medical evaluation for represented employees in denied injury cases were intended to bring that process more in line with the procedures for unrepresented employees. In those cases, a QME panel may be requested by the employee immediately upon receipt of the denial letter, and by the employer 10 days later if the employee does not request the panel. No second letter notifying the opposing party of its intention to obtain a panel is required, nor is there any reason for one. Once a denial letter is issued, if a medical evaluation is required to determine compensability, no purpose is served by holding up that process until one party sends a letter to the other to initiate the process. The same applies to cases where the employee is represented. Eliminating the requirement that a party requesting a QME panel propose an AME first, but retaining the requirement that a letter must still be sent and an additional 10-day waiting period must pass before a panel can be requested, does nothing to streamline the current process and eliminate unnecessary delays. Allowing parties to request a QME panel 10 days after the denial letter issues would achieve that goal.

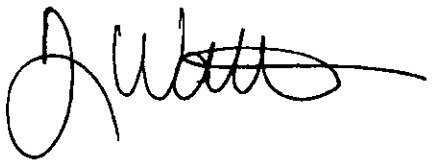
Based on the foregoing, the undersigned found that Applicant's panel request, which was made more than 10 days after the denial letter was sent, satisfied the requirements of the statutory framework for obtaining a QME panel. It was felt that the legislative intent of SB 863 is best achieved by resolving the ambiguity in the Sections

4060/4062.2(b) process for requesting a QME panel in denied injury cases with represented employees in that manner.

IV.

RECOMMENDATION

For the reasons set forth herein, it is respectfully recommended that Defendant's petition be denied.



Date: November 12, 2014

DOUGLAS A. WATKINS
Workers' Compensation Judge