

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **SANDY CHAIDES,**

5 *Applicant,*

6 **vs.**

7 **THE KROGER COMPANY dba RALPHS**
8 **GROCERY COMPANY, permissibly**
9 **self-insured, administered by SEDGWICK,**

10 *Defendants.*

Case No. ADJ8128486
(Oxnard District Office)

OPINION AND ORDER
GRANTING PETITION FOR
REMOVAL AND DECISION
AFTER REMOVAL

11 Defendant seeks removal in response to an Order issued by the workers' compensation
12 administrative law judge (WCJ) at a mandatory settlement conference (MSC) on September 22, 2015,
13 which granted applicant's request for the replacement of the orthopedic qualified medical evaluator
14 (QME) Dr. Michael Klassen and directed the Medical Director to issue a new QME panel in the same
15 specialty.

16 Defendant contends the Order is in error and subject to removal because replacing Dr. Klassen as
17 the QME based on his improper demand for advance payment of deposition fees is an inappropriate and
18 excessive remedy, would reward doctor shopping on the part of applicant, and is contrary to the goals of
19 timely and efficient resolution of the case since he has already examined applicant twice, and has issued
20 five reports over the last two plus years. Defendant further contends that a failure to set aside the order
21 would result in significant prejudice and/or irreparable harm.

22 We have received an answer from applicant. The WCJ filed a Report and Recommendation on
23 Petition for Removal (Report), recommending the petition be denied.

24 We have considered the Petition for Removal, applicant's answer, and the WCJ's Report, and for
25 the reasons discussed below, we will grant removal and rescind the Order.

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1 **BACKGROUND**

2 Applicant was employed by defendant as a baker. She claims cumulative industrial injury to her
3 hands, right elbow, right shoulder, neck/cervical spine, thoracic outlet syndrome, and hypertension as a
4 compensable consequence, from January 1, 1992 through December 13, 2011. In 2013, the parties
5 obtained a QME panel in orthopedics but the doctor remaining after the exercise of the parties' respective
6 strikes was not available. As a result, the parties entered into a joint request and stipulation that was
7 approved as an order dated June 18, 2013, for the issuance of a new QME panel. It appears that
8 Dr. Klassen was the resulting QME from that panel after the exercise of strikes. He is not an agreed
9 medical evaluator or an agreed panel QME. Dr. Klassen examined applicant and issued a first report
10 dated September 26, 2013. He issued supplemental reports dated February 6, 2014, July 28, 2014, and
11 March 3, 2015. He re-examined applicant and issued a related report dated September 11, 2014. Those
12 reports have not been filed and are not in evidence.

13 It appears from the pleadings that defendant obtained sub rosa surveillance video of applicant
14 which was sent to Dr. Klassen for review and who in turn issued the supplemental report dated
15 March 3, 2015. Applicant notes in a letter sent to the WCJ dated April 9, 2015 that although defendant
16 claimed it had served a copy of the sub rosa video sent to Dr. Klassen, she had yet to receive any video
17 despite an oral request for a copy and a follow-up a written request dated March 3, 2015. That same letter
18 argues that applicant will be severely prejudiced if she does not receive the video and is not able to take
19 the deposition of Dr. Klassen with respect to issues and opinions potentially affected by the video.

20 Applicant subsequently noticed the deposition of Dr. Klassen for October 16, 2015. Dr. Klassen
21 in response sent a "Medical-Legal Deposition Policy and Agreement Industrial Injuries" to applicant's
22 attorney dated July 7, 2015. The agreement provided for pre-payment of a \$1,000.00 deposition fee
23 which must be received "at least 11 business days before the deposition" or his office would
24 "automatically cancel" the deposition. The agreement requires the scheduling party's signature reflecting
25 agreement to the terms, and referenced the specific date and location of the scheduled deposition. The
26 implication of the document is that without a returned signed copy, Dr. Klassen would not schedule or
27 cooperate with efforts to take his deposition as the QME in the case.

1 Applicant e-filed a Declaration of Readiness to Proceed on August 11, 2015, requesting a MSC
2 on its claim that it was entitled to replacement of Dr. Klassen as the QME and a new QME panel based
3 on his deposition policy, which was attached, and which she asserted was contrary to Code of Civil
4 Procedure section 2034.450(a). The matter was set for MSC on September 22, 2015. After oral argument
5 by the parties at the MSC, the WCJ granted applicant's request for a new QME panel in orthopedics and
6 issued the Order directing the Medical Director to issue such a panel on the basis that Dr. Klassen's
7 demand and policy requiring advanced payment of deposition fees violated Code of Civil Procedure
8 section 2034.450 and Rule 35.5(f) (Cal.Code Regs. tit. 8, § 35.5(f)).¹ Because the Order in question
9 issued at the MSC without a formal submission, there are no exhibits. Although the Minutes of Hearing
10 for the September 22, 2015 MSC indicate in a handwritten note that the parties stipulated to facts, there is
11 no indication or documentation as to exactly what those were.

12 Defendant filed a timely Petition for Removal in response to the Order. Applicant filed an answer.
13 The WCJ issued a Report recommending the petition be denied.

14 DISCUSSION

15 A request for removal will be granted only if the petitioner shows that significant prejudice or
16 irreparable harm will result if removal is not granted and reconsideration will not be an adequate remedy
17 after the issuance of a final order, decision or award. (WCAB Rule 10843(a); see also *Cortez v. Workers'*
18 *Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5];
19 *Kleman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases
20 133, 136, fn. 2].)

21 Labor Code section 5710 provides that depositions by any party before the Workers'
22 Compensation Appeals Board "shall be taken in the manner prescribed by law for like depositions in
23 civil actions" outlined in Code of Civil Procedure section 2016.010 et seq. Code of Civil Procedure
24 section 2034.450(a) provides "[t]he party taking the deposition of an expert witness shall either
25 accompany the service of the deposition notice with tender of the expert's fee based on the anticipated
26

27 ¹ All further references to administrative rules and regulations are to the California Code of Regulations.

1 length of the deposition, or tender that fee on the commencement of the deposition.” Rule 35.5(f)
2 provides in relevant part “[u]nless the Appeals Board or a Workers’ Compensation Administrative Law
3 Judge orders otherwise or the parties agree otherwise, whenever a party is legally entitled to depose the
4 [QME] evaluator, the evaluator should make himself or herself available for deposition within at least
5 one hundred twenty (120) days of the notice of deposition . . .”

6 In this case, it appears that Dr. Klassen’s mandatory deposition policy and the associated
7 “agreement,” which includes a requirement that he receive a deposition fee payment of \$1,000.00 at least
8 11 business days in advance of any scheduled deposition as a condition of proceeding with the
9 deposition, may conflict with both Code of Civil Procedure section 2034.450(a), which allows for
10 payment of the deposition fee at the commencement of the deposition, and Rule 35.5(f) which states
11 QMEs shall make themselves available for deposition within 120 days of a request or notice from a
12 party. Additionally, to the extent that Dr. Klassen’s deposition policy and agreement requires advance
13 payment of a \$1,000.00 fee, it also fails to comply with the applicable QME deposition rate of \$250.00
14 an hour provided for in the Medical Legal Fee Schedule adopted pursuant to WCAB Rule 9795. (See
15 summary in Table 12 of the Workers’ Compensation Laws of California 2016 Edition p. 1344
16 (LexisNexis).)²

17 If Dr. Klassen’s deposition policy and its terms are inconsistent with and contrary to statute
18 and/or administrative rules, he may be subject to sanction, discipline, or other regulatory action by the
19 Medical Director under Administrative Director Rules 60 and 65. However, the question presented in this
20 case is whether Dr. Klassen’s deposition policy in itself, entitles either party to replace him with a new
21 QME panel from the Medical Director, without consideration of any other factors. We conclude it does
22 not, and we will therefore grant removal and rescind the Order directing the Medical Director to issue a
23 new QME panel in orthopedics.

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25 ² Those rules provide that the fee for medical-legal testimony shall include payment of an hour of preparation and an hour of
26 deposition testimony, which at an hourly rate of \$250.00 for non-agreed upon QME’s, comes to an initial fee of \$500.00,
27 subject to later payment of additional amounts if the deposition goes longer than one hour or if additional preparation was
required.

1 Dr. Klassen has been the reporting orthopedic QME in this case since September of 2013. He has
2 issued multiple reports and has examined applicant twice. It appears the contemplated deposition noticed
3 by applicant was intended to question him with regard to the sub rosa video taken by defendant which he
4 reviewed and commented on in his supplemental report of March 3, 2015. In other words, discovery
5 would seem to be nearly complete and once the deposition is concluded, the case should be at or close to
6 the point at which it can be appropriately set for MSC. We are mindful of both the time invested by the
7 parties with this QME and the desire to avoid the use of technical procedures to obtain a new
8 medical-legal evaluation which might be more favorable than the opinions of the existing QME.

9 Applicant cites no authority to support her contention that the QME may be replaced and that she
10 is entitled to a new QME panel based on the deposition policy of the reporting QME, even if that policy
11 could be shown to conflict with the Code of Civil Procedure and/or WCAB medical-legal discovery
12 rules. Although applicant's answer asserts that she is entitled to a replacement QME when "a QME
13 cannot comply with the QME rules" pursuant to Rule 31.5 generally and without citation to a subsection,
14 we do not believe that any individual provision of that rule provides for such relief where the alleged rule
15 violation is based on an improper deposition policy alone.

16 In contrast, defendant's Petition for Removal notes the panel decision of *Rodas v. Travelers Cas.*
17 *And Surety Co.* (2007) 35 CWCR 156, which on similar facts held that although the QME's deposition
18 policy in that case requiring advanced payment of a deposition fee might be inconsistent with the law,
19 applicant petitioner had not established significant prejudice and/or irreparable harm when the WCJ
20 declined applicant's request to strike the QME's prior reports and denied removal. A similar situation
21 exists in this case. Replacement of a QME years after an initial evaluation and after multiple reports and
22 examinations is not to be taken lightly when considering the goal of promoting timely resolution of
23 claims and the constitutional imperative that California workers' compensation law be administered in
24 such manner as to "accomplish substantial justice in all cases expeditiously, inexpensively, and without
25 incumbrance of any character." (Cal. Const., art. XIV, § 4.) Likewise, actual or perceived doctor
26 shopping via the use of procedural challenges should be discouraged. To have applicant evaluated by a
27 new QME at this late point in the proceedings, even though Dr. Klassen's prior reports are still

1 admissible, will increase costs and significantly delay the ultimate resolution of this case. Thus, we
2 conclude that the replacement of Dr. Klassen as the QME solely for an improper deposition policy is not
3 warranted as a remedy under the circumstances of this particular case.

4 Accordingly, we find that defendant has shown it will suffer significant prejudice or irreparable
5 harm and that reconsideration of a final order will not be a sufficient remedy if the WCJ's Order
6 replacing Dr. Klassen as the QME is not set aside. We therefore grant removal and rescind the Order.

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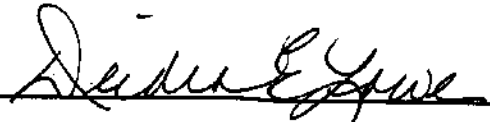
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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Removal of the Order issued on
3 September 22, 2015, which granted applicant's request to replace Dr. Michael Klassen as the QME and
4 for a new QME panel in the specialty of orthopedics, is **GRANTED**.

5 **IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation
6 Appeals Board, that the Order directing the Medical Director to issue a replacement QME panel in
7 orthopedics is **RESCINDED**.

8 **WORKERS' COMPENSATION APPEALS BOARD**

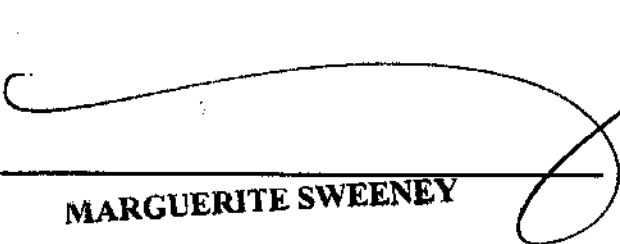
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DEIDRA E. LOWE

11 **I CONCUR,**

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14 _____
15 **KATHERINE ZALEWSKI**

16 **I DISSENT (See attached dissenting opinion.),**

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18 
19 _____
20 **MARGUERITE SWEENEY**



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

22 **APR 01 2016**

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

25 **BRADFORD & BARTHEL**
26 **GORDON, EDELSTEIN, KREPAK, GRANT, FELTON & GOLDSTEIN**
27 **SANDY CHAIDES**

TR:mm

1 **DISSENTING OPINION OF COMMISSIONER SWEENEY**

2 I respectfully dissent from the panel's decision to grant removal since I agree with the WCJ's
3 conclusion in his Report, which I would adopt and incorporate, that defendant has failed to show it will
4 suffer significant prejudice or irreparable harm absent removal, and that reconsideration from a final
5 order will not be an adequate remedy. This is the legal standard for removal and it has not been met.
6 Therefore, I would affirm the WCJ who appropriately exercised his discretion under the circumstances.
7 Additionally, although granting removal, the panel does not dispute that Dr. Klassen's demand for
8 prepayment of his deposition fee was improper and contrary to the law and to administrative rules, both
9 as to the amount sought and his demand for payment at least 11 business days before the deposition.

10 In my judgment, defendant has not met its burden with respect to removal of the WCJ's Order in
11 this case, and I would deny removal.



WORKERS COMPENSATION APPEALS BOARD

(Handwritten signature)

MARGUERITE SWEENEY, Commissioner

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

18 **APR 01 2016**

19
20 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
21 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

22 **BRADFORD & BARTHEL**
23 **GORDON, EDELSTEIN, KREPAK, GRANT, FELTON & GOLDSTEIN**
24 **SANDY CHAIDES**

(Handwritten initials)

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27 **TR:mm**

CHAIDES, Sandy

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ8128486

SANDY CHAIDES

-vs.-

THE KROGER COMPANY,
D/B/A RALPHS GROCERY
COMPANY; PERMISSIBLY
SELF-INSURED,
ADMINISTERED BY
SEDGWICK

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

CRAIG A. GLASS

DATE:

1/1/92 – 12/13/11

REPORT AND RECOMMENDATION
ON PETITION FOR REMOVAL

I

INTRODUCTION

1. Applicant's Occupation : Baker
2. Applicant's Age : 52
3. Date of Injury : 1/1/92 – 12/13/11
4. Parts of body injured : Hands, right elbow, right shoulder and neck
5. Manner in which injuries Occurred : Unknown
6. Identity of Petitioner : **Defendant** attorney filed Petition
7. Timeliness : The Petition was **timely**

8. Verification : Verification is attached to the Petition
9. Date of issuance of Order : 9/22/15

II

PETITIONERS' CONTENTIONS:

Petitioner the Kroger Company, d/b/a Ralphs Grocery Company, permissibly self-insured, administered by Sedgwick, files this timely and verified "Petition for Reconsideration" contending that the Court should not replace the panel QME after the doctor, in violation of the California Code of Civil Procedure (section 2034, *et. seq.*), the California Labor Code and the QME regulations required pre-payment of his deposition fees before making himself available for a deposition.

III

RELEVANT PROCEDURAL HISTORY

Applicant Sandy T. Chaides, born 3/18/59, while employed during the period 1/1/92 through 12/13/11, as a baker at Moorpark, California, by the Kroger Company, d/b/a Ralphs Grocery Company, permissibly self-insured, administered by Sedgwick, sustained injury arising out of and in the course of her employment to her Hands, right elbow, right shoulder and neck.

The parties obtained a panel doctors "PQME's" in as many as two fields of specialty.

On June 18, 2013, by stipulation of the parties, the following Order issued:

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL ACCIDENTS
WORKERS' COMPENSATION APPEALS BOARD

SANDY T. CHAIDES

Applicant,

vs.

THE KROGER COMPANY DBA RALPHS
GROCERY COMPANY, PERMISSIBLY
SELF-INSURED, ADMINISTERED BY
SEDGWICK

Defendants

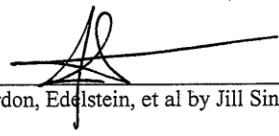
Case No. ADJ8128486

**STIPULATION & ORDER TO OBTAIN
REPLACEMENT PANEL**

The parties received PQME panel 1494596. After each side struck a physician, the remaining physician was Dr. Neilesh Ghodadra. It was ascertained when the applicant's attorney called the doctor's office to set up an evaluation that the doctor was no longer employed at Southern California Orthopedic Institute which is the address and phone number listed on the panel. The defense attorney also called the phone number and was told the doctor did not work there anymore and there was no new address for the doctor.

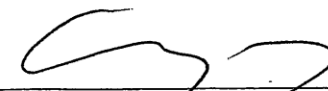
The parties stipulate and agree that a replacement panel should be ordered in this matter. by the signatures of the parties below, it is requested that the Board issue an Order for a replacement panel.


Bradford & Barnet by David Jones


Gordon, Edelstein, et al by Jill Singer

GOOD CAUSE APPEARING, it is ordered that a replacement panel in orthopedics be issued by the Medical Unit due to the unavailability of the remaining physician, Dr. Ghodadra.

IT IS ORDERED
Dated: 6/18/13


WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE
CATWELTS

It is unknown if the current "PQME" was obtained as a result of this Order.

PQME Michael Klassen, M.D., apparently issued a report that applicant felt required further clarification.

Within the statutory time, applicant set the deposition of Dr. Klassen.

At some point, prior to the deposition and still within the statutory time to depose the doctor, Dr. Klassen demanded pre-payment for him to sit at a deposition

Applicant objected and requested a new (replacement) “PQME” panel.

Applicant filed a “Declaration of Readiness to Proceed” on the issue of obtaining a replacement panel.

The parties appeared before the undersigned.

After hearing arguments from both parties, and noting the doctor’s violation of the California Code of Civil Procedure (section 2034, *et. seq.*), the California Labor Code and the QME regulations, the following Order issued:

State of California
Department of Industrial Relations
Division of Workers' Compensation
Workers' Compensation Appeals Board

Sandy Chaides
Applicant,
v.
Ralphs
Defendants,

WCAB Case No (s) A058128486
Existing QME Panel No. 1521268
Finding and Order Re: Replacement QME Panel
pursuant to 8 CCR § 31.5 (Represented Case)

It is hereby found that a replacement panel of QMEs shall issue to replace one or more of the QMEs listed in the panel mentioned above shall because:

Panel member Michael Klassen shall be replaced because of the reason set forth below:
violation of CCP 2031.450 (a) and 8 Title CCR 35.5(f)

This QME was the last remaining QME after the parties completed the striking process.

Panel member H.L. Brooks shall be replaced because of the reason set forth below:
Member was stricken

Panel member Armir Davakjian shall be replaced because of the reason set forth below:
member was stricken

IT IS ORDERED THAT the Medical Director, Division of Workers' Compensation, issue within 30 days of the date of service of this order a QME panel in the specialty previously issued pursuant to section 31 of title 8 of the California Code of Regulations. Upon receipt of the panel the parties shall follow the procedures in Labor Code section 4062.2 to determine which qualified medical evaluator from the panel will perform the evaluation. The party designated below shall serve the Medical Unit with the order and the attached proof of service. The applicant's current address is 32 AD Greenville DR.

Simi Valley City CA State 93063 Zip Code

Date: 9/22/15

Notice to: had send by wt 5000 on public meet
for CC (100)
Workers' Compensation Judge
Workers' Compensation Appeal Board
CHALCO GUTS

Pursuant to Rule 10500, you are designated to serve this document on all parties shown on the Official Address Record (a copy of which is attached) and the Medical Unit along with a proof of service. You shall maintain the proof of service, which shall not be filed with the WCAB unless a dispute arises regarding service of the document.

Replacement panel represented -2014

It is from this Order that Petitioner the Kroger Company, d/b/a Ralphs Grocery Company, permissibly self-insured, administered by Sedgwick files this "Petition for Removal".

IV
DISCUSSION

Petitioner defendant the Kroger Company, d/b/a Ralphs Grocery Company, permissibly self-insured, administered by Sedgwick has failed to demonstrate that proceeding to a new “Replacement” “PQME” will cause irreparable harm. This “irreparable harm” is difficult to demonstrate in light of the current status of the case and prior change of another “PQME” in this matter.

Per Cal. Code Reg., section 10843(b):

“(1) The order, decision or action will result in significant prejudice.

(2) The order, decision or action will result in irreparable harm.

The petitioner must also demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award.”

Petitioner defendant the Kroger Company, d/b/a Ralphs Grocery Company, permissibly self-insured, administered by Sedgwick notes that a change in the “PQME” could delay the case. Petitioner failed to note that there had been a stipulated change in the past on 6/18/13 when a prior “PQME” changed employment.

In this instance, “PQME” Michael Klassen, M.D., apparently issued multiple reports.

Applicant was apparently unhappy with his last reporting and attempted to timely set the doctor’s deposition.

The parties agree that Dr. Klassen demanded pre-payment for the deposition in violation of California Code of Civil Procedure, section 2034.450 (a), Title 8 CCR 35.5 (f), and the QME regulations.

Applicant moved to strike the “PQME” and requested a replacement panel.

After hearing the arguments and stipulations of the parties, noting a prior change in the "PQME" in another specialty, and the general status of the case, the Court determined that a replacement panel should issue.

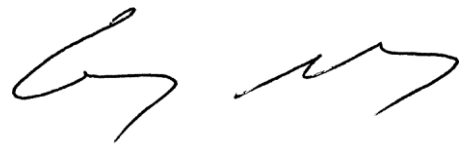
The then "PQME" was and is apparently unfamiliar with the rules and practices upon which a "PQME" should act. This ruling is, in the opinion of the undersigned, a fair resolution and warning to the doctor to comply with appropriate rules and laws regarding reporting before the WCAB.

V

RECOMMENDATION

For the reasons stated above, it is respectfully submitted that the "Petition for Removal" filed by defendant the Kroger Company, d/b/a Ralphs Grocery Company, permissibly self-insured, administered by Sedgwick, should be denied.

DATE: 10/27/15



Craig Alan Glass
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

BRADFORD BARTHEL VENTURA, Email
GORDON EDELSTEIN LOS ANGELES, Email
SEDGWICK 14563 LONG BEACH, US Mail
SEDGWICK 2065 OAKLAND, US Mail

Served on above parties by preferred method of service shown above at addresses shown on attached Proof of Service:

ON: 10/27/2015

BY: *Jill Contreras*
Jill Contreras