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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOHN CAMPBELL (deceased),

Applicant,

vs.

**CITY OF RED BLUFF FIRE DEPARTMENT,
permissibly self-insured, as administered by
YORK RISK SERVICES GROUP, INC.,**

Defendants.

Case No. ADJ10856280
(Redding District Office)

**OPINION AND ORDER
GRANTING PETITION
FOR REMOVAL
AND DECISION
AFTER REMOVAL**

Applicant, the dependent of the deceased, seeks removal in response to the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 3, 2018.¹ By the F&O, the WCJ found that the first three qualified medical evaluator (QME) panels were invalid and the fourth panel was the correct and legitimate panel. The parties were ordered to proceed with strikes from the fourth panel and schedule an evaluation with the last remaining QME at the earliest opportunity.

Applicant contends that the first and second panels were requested using the wrong claim number and are therefore invalid. Applicant also contends that a physician from the third panel was properly chosen and has already evaluated the now deceased employee.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that removal be granted to revise the Opinion on Decision, but the F&O otherwise be affirmed.

We have considered the allegations of applicant's Petition for Removal and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant removal, rescind the F&O and substitute a new finding of fact that all four QME

¹ The F&O is dated November 30, 2018, but was not served until December 3, 2018.

1 panels are invalid. We will also order the parties to agree to an agreed medical evaluator (AME) within
2 10 days (plus 5 days for mailing) or, if the parties are unable to agree to an AME, the WCJ may appoint a
3 regular physician to evaluate the claim pursuant to Labor Code section 5701. (Lab. Code, § 5701.)²

4 **FACTUAL BACKGROUND**

5 The deceased employee claimed injury through November 30, 2016 in the form of prostate cancer
6 while employed as a fire captain by the City of Red Bluff Fire Department. This claim has apparently
7 been denied by defendant.

8 Defendant requested a QME panel in internal medicine pursuant to section 4060, which the
9 Medical Unit issued on June 15, 2017 as panel number 7119810. (Lab. Code, § 4060; Joint Exhibit No.
10 1, QME panel obtained online, June 15, 2017.) The panel request stated the claim number as NCWA-
11 10856280. (*Id.* at pp. 1 and 3.) On June 19, 2017, defendant sent applicant a letter stating its strike from
12 the panel.³ (Joint Exhibit No. 2, Defense letter striking, June 19, 2017.) Applicant sent defendant a letter
13 with a strike from the panel on June 23, 2017. (Joint Exhibit No. 3, Applicant's letter striking, June 23,
14 2017.) The last remaining physician from the panel was purportedly unable to schedule an evaluation
15 within 60 days.

16 Defendant requested a replacement QME panel pursuant to Administrative Director (AD) Rule
17 31.5(a)(2). (Cal. Code Regs., tit. 8, § 31.5(a)(2); Joint Exhibit No. 4, Replacement QME panel, August
18 9, 2017.) Panel number 2114166 issued pursuant to defendant's request on August 9, 2017. (*Id.*) The
19 panel again stated the claim number as NCWA-10856280. (*Id.*) The panel included Tet Toe, M.D.,
20 Raye Bellinger, M.D. and Thomas Allems, M.D. (*Id.*) On August 14, 2017, defendant sent applicant a
21 letter stating its strike from the panel. (Joint Exhibit No. 5, Defense letter striking, August 14, 2017.)
22 Applicant sent defendant a letter with a strike from the panel on August 15, 2017. (Joint Exhibit No. 6,
23 Applicant's letter striking, August 15, 2017.) The last remaining physician from the panel was again
24 purportedly unable to schedule an evaluation within 60 days.

25
26 ² All further statutory references are to the Labor Code unless otherwise stated.

27 ³ Section 4062.2(c) provides that "[w]ithin 10 days of assignment of the panel by the administrative director, each party may strike one name from the panel." (Lab. Code, § 4062.2(c).)

1 On September 7, 2017, applicant submitted an online request for a QME panel in internal
2 medicine utilizing claim number NCWA-557465. (Joint Exhibit No. 7, QME panel obtained online,
3 September 7, 2017.) Panel number 7136113 issued that day per applicant's request. (*Id.* at p. 1.) This
4 panel included the following physicians: Juan Larach, M.D., Roger Nacouzi, M.D. and Raye Bellinger,
5 M.D. (*Id.*) The panel stated the number of requests for this matter to be 1. (*Id.*) Applicant sent
6 defendant a letter striking Dr. Bellinger from the panel on September 8, 2017. (Joint Exhibit No. 8,
7 Applicant's letter striking, September 8, 2017.)

8 On September 28, 2017, defendant sent applicant a letter advising of its objection to any
9 appointment with Dr. Larach from panel number 7136113 "due to the untimeliness of the setting on
10 12/8/17" and stating that it would be requesting a replacement panel per AD Rule 31.5(a)(2).
11 (Defendant's Exhibit E, Defense letter to applicant's attorney, September 28, 2017.) On the same date,
12 defendant submitted a request for a replacement panel on the basis that Dr. Larach from panel number
13 7136113 cannot schedule an exam within 60 or 90 days pursuant to AD Rule 31.5(a)(2). (Defendant's
14 Exhibit F, Replacement panel request, September 28, 2017.) Defendant's replacement panel request
15 stated the claim number as NCWA-10856280. (*Id.*)

16 The following day, a QME Appointment Notification Form was sent to the parties stating that an
17 evaluation of applicant with Dr. Nacouzi had been set for November 9, 2017. (Defendant's Exhibit G,
18 QME Appointment Notification Form, September 29, 2017.) The Form stated the panel number as
19 7119810. (*Id.* at p. 1.) Defendant sent Dr. Nacouzi two letters objecting to his evaluation on October 13,
20 2017 and November 8, 2017. (Defendant's Exhibits A-B, Defense letters to Dr. Nacouzi, October 13,
21 2017 and November 8, 2017.) Defendant also sent a letter separately to applicant on October 13, 2017
22 advising of its objection to an evaluation with Dr. Nacouzi since defendant "set an appointment with Dr.
23 Larach when we had the legal authority to do so, which in effect struck Dr. Nacouzi from the panel."
24 (Defendant's Exhibit D, Defense letter to applicant's attorney, October 13, 2017, p. 1.)

25 On November 1, 2017, replacement QME panel number 2147133 issued pursuant to defendant's
26 request. (Joint Exhibit No. 9, Replacement QME panel, November 1, 2017.) The panel stated the claim
27 number as NCWA-557465. (*Id.*)

1 Dr. Nacouzi evaluated the employee on November 9, 2017 and issued a report of the same date.
2 (Minutes of Hearing (Reporter), August 29, 2018, p. 2.) The employee died on September 2, 2018.

3 The matter proceeded to trial on August 29, 2018.⁴ The parties stipulated in relevant part that:

4 A panel was originally issued June 15, [2017⁵], (Panel No. 1), and a
5 replacement panel issued on August 9, 2017, (Panel No. 2), both of which
6 noted an incorrect claim number. Applicant's attorney obtained Panel No.
7 7136113, the third panel, on September 7, 2017, through the online system
8 as an original panel request.

(Minutes of Hearing, August 29, 2018, p. 2.)

9 The issues at trial were identified as follows:

- 10 1. Whether the panel request that resulted in Panel No. 7136113 issued
11 September 7, 2017, was properly obtained as an original panel.
- 12 2. Whether the applicant waived an objection to the first and second panels by
13 not raising the issue of the improper claim number before the first Petition
14 for Reconsideration.
- 15 3. Whether defendants were required to strike per Labor Code 4062.2 or if
16 defendant's selection of Dr. Larach from Panel No. 7136113 effectively
17 struck Dr. Nacouzi.
- 18 4. Whether applicant waived an objection to Panel No. 7136113 by not
19 raising the issue before the first Petition for Reconsideration.

(*Id.*)

20 In the resulting F&O, the WCJ found that panel numbers 7119810 and 2114166 were invalid
21 because the remaining QME after the parties' strikes could not schedule an evaluation within sixty (60)
22 days. The WCJ also found panel number 7136113 is invalid because one of the three listed doctors, Dr.

23 _____
24 ⁴ The parties' dispute regarding the proper QME panel initially proceeded to trial on February 28, 2018 with a Findings and
25 Order issued on April 26, 2018, wherein the WCJ found that the last panel, panel number 2147133, was the correct panel.
26 Applicant petitioned for reconsideration of this Findings and Order on May 21, 2018, in part on the basis that defendant's first
27 and second panel requests were invalid due to use of an incorrect claim number. In response, the WCJ rescinded the first
Findings and Order on May 23, 2018.

⁵ The Minutes of Hearing incorrectly state the date of this panel request as "June 15, 2007." (Minutes of Hearing, August 29,
2018, p. 2.) The evidence in the record reflects the correct date to be June 15, 2017. (Joint Exhibit No. 1, QME panel
obtained online, June 15, 2017.)

1 Bellinger, was also listed on panel number 2114166. Panel number 2147133 was found to be the correct
2 and legitimate panel. The parties were ordered to proceed with strikes from this panel, select a remaining
3 QME and schedule an evaluation at the earliest opportunity.

4 DISCUSSION

5 I.

6 Section 4060 provides as follows in relevant part:

7 (a) This section shall apply to disputes over the compensability of any injury.
8 This section shall not apply where injury to any part or parts of the body is
9 accepted as compensable by the employer.

10 (c) If a medical evaluation is required to determine compensability at any time
11 after the filing of the claim form, and the employee is represented by an
12 attorney, a medical evaluation to determine compensability shall be
13 obtained only by the procedure provided in Section 4062.2.

(Lab. Code, § 4060(a) and (c).)

14 Section 4062.2 provides the procedure to obtain a QME panel if the employee is represented by an
15 attorney. (Lab. Code, § 4062.2.)

16 AD Rule 31.5(a) enumerates the circumstances under which a party may request a replacement
17 QME panel. (Cal. Code Regs., tit. 8, § 31.5(a).) This includes the following:

18 (2) A QME on the panel issued cannot schedule an examination for the
19 employee within sixty (60) days of the initial request for an appointment,
20 or if the 60 day scheduling limit has been waived pursuant to section 33(e)
21 of Title 8 of the California Code of Regulations, the QME cannot schedule
22 the examination within ninety (90) days of the date of the initial request for
23 an appointment.

(Cal. Code Regs., tit. 8, § 31.5(a)(2).)

24 The parties do not appear to dispute that the last remaining QME on the first two panels was
25 unable to schedule an examination within 60 days of the initial request for an appointment. Therefore,
26 we agree with the WCJ's findings of fact regarding the invalidity of panel numbers 7119810 and
27 2114166.

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II.

The party submitting an online request for a QME panel in a represented case must identify several elements in the request including the claim number. (Cal. Code Regs., tit. 8, § 30(b)(1)(A)(1)(ii).) AD Rule 30(c) states as follows:

If after the issuance of a panel it appears to the satisfaction of the Medical Director that the panel was issued by mistake, misrepresentation of fact contained in the forms or document filed in support of the request, or the parties have agreed to resolve their dispute using an AME or by other agreement, the issued panel may be revoked. Notice of the revocation shall be sent to parties listed on the panel request.

(Cal. Code Regs., tit. 8, § 30(c).)

Applicant contends that the first two panel requests by defendant were invalid because the wrong claim number was listed in those requests. AD Rule 30(c) permits an issued panel to be revoked if it was issued by mistake or misrepresentation of fact in the forms filed in support of the panel request. A mistake or misrepresentation of fact may presumably include identification of the incorrect claim number on the panel request. However, the language of Rule 30(c) indicates that a panel may be revoked if “it *appears to the satisfaction of the Medical Director* that the panel was issued by issued by mistake or misrepresentation of fact.” Neither of the two panels initially requested by defendant were revoked by the Medical Director pursuant to AD Rule 30(c).

Applicant was entitled to request a replacement panel for the second panel (number 2114166) since the last remaining QME could not schedule an evaluation within 60 days per the discussion above. In order to submit a panel request as a *new request* rather than a replacement panel request, applicant was obligated to obtain revocation of the prior panels pursuant to AD Rule 30(c). The evidence in the record does not reflect that applicant sought to have the first two panels revoked prior to submitting a new request for another panel utilizing the correct claim number.

The third panel improperly issued as a new QME panel rather than a replacement QME panel, which led to a panel with a physician already listed on one of the prior panels. (See Cal. Code Regs., tit. 8, § 31.5(c).) We consequently also agree with the WCJ’s finding that QME panel number 7136113 is

1 invalid.

2
3 **III.**

4 Pursuant to section 4062.2(c), each party has ten days from assignment of a QME panel to strike
5 one member of the panel. The statute specifies that “[i]f a party fails to exercise the right to strike a
6 name from the panel within 10 days of assignment of the panel by the administrative director, the other
7 party may select any physician who remains on the panel to serve as the medical evaluator.” (Lab. Code,
8 § 4062.2(c).)

9 With respect to service by mail, the Code of Civil Procedure (CCP) section 1013 provides, in
10 relevant part, as follows:

11 . . . Service is complete at the time of the deposit, but any period of notice
12 and any right or duty to do any act or make any response within any period
13 or on a date certain after service of the document, which time period or
14 date is prescribed by statute or rule of court, shall be extended by five
15 calendar days, upon service by mail, if the place of address and the place of
16 mailing is within the State of California . . .

17 (Code Civ. Proc., § 1013(a).)

18 WCAB Rule 10507 also provides that:

19 (a) If a document is served by mail, fax, e-mail, or any method other than
20 personal service, the period of time for exercising or performing any right
21 or duty to act or respond shall be extended by:

22 (1) five calendar days from the date of service, if the physical address of the
23 party, lien claimant, attorney, or other agent of record being served is
24 within California . . .

25 (Cal. Code Regs., tit. 8, § 10507(a)(1).)

26 In *Razo v. Las Posas Country Club* (February 7, 2014, ADJ8381652) [2014 Cal. Wrk. Comp.
27 P.D. LEXIS 12],⁶ the Appeals Board held that the time within which to strike a name from a QME panel
under section 4062.2(c) is extended by five calendar days pursuant to CCP section 1013(a). In that

⁶ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).) Here, we refer to *Razo* because it considered a similar issue.

1 matter, the QME panel issued on January 3, 2013, after the amended version of section 4062.2 became
2 effective pursuant to Senate Bill 863. The *Razo* panel held that although the Administrative Director is
3 not necessarily bound by the five-day extension in WCAB Rule 10507, CCP section 1013 “is controlling,
4 and it adds five days to the time within which a party may strike a panel QME name after the
5 Administrative Director ‘assigns’ the panel. The same result is reached even if Rule 10507 applies.” (*Id.*
6 at p. *15.) A party thus “has a total of 15 days after assignment to strike a name from the QME panel.”
7 (*Id.* at p. *17.)

8 The *Razo* panel cited to *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals
9 Board en banc), wherein the Appeal Board held that under former section 4062.2(b), a written AME
10 proposal made by mail or any method other than personal service extends the period to agree on an AME
11 by five days. The *Messele* panel held that, pursuant to the CCP, the Civil Code and the Government
12 Code, the time within which to agree to an AME is calculated by “excluding the first day.” (*Id.* at p. 966
13 [citing Code Civ. Proc., § 12, Civ. Code, § 10 and Gov. Code, § 6800].)

14 In this matter, panel number 7136113 issued on September 7, 2017. The record reflects that
15 defendant and its attorney are located in California. Excluding the first day the panel issued (September
16 7, 2017), 15 days from the assignment of the QME panel falls on September 22, 2017, which was a
17 Friday.⁷ Applicant timely issued a strike from the panel on September 8, 2017. However, the evidence
18 does not contain a strike by defendant from this panel. Even assuming defendant’s September 28, 2017
19 letter stating that it was objecting to any appointment with Dr. Larach from the panel could be construed
20 as a “strike” of Dr. Nacouzi, this purported strike was after September 22, 2017 and therefore, was
21 untimely.

22 Defendant requested and obtained a replacement QME panel (panel number 2147133) for panel
23 number 7136113. The September 28, 2017 replacement panel request was submitted based on the
24 inability of Dr. Larach to schedule an appointment within 60 days of the initial request for an
25 appointment. However, the record is unclear if Dr. Larach may properly be considered the last remaining
26

27 ⁷ The Appeals Board takes judicial notice that September 22, 2017 was a Friday pursuant to Evidence Code section 451(f).
(Evid. Code, § 451(f).)

1 QME from panel number 7136113 since defendant did not submit a timely strike from that panel. Under
2 these circumstances, we will also find panel number 2147133 to be invalid.

3
4 **IV.**

5 The Appeals Board has a constitutional mandate to “accomplish substantial justice in all cases
6 expeditiously, inexpensively, and without incumbrance of any character.” (Cal. Const., art. XIV, § 4.) It
7 has now been more than two years since the Application for Adjudication of Claim was filed, during
8 which time the Medical Unit has issued four QME panels. All four of these panels are invalid pursuant
9 to the analysis above. The employee also passed away during these proceedings. The current record
10 does not reflect that the threshold issue of injury arising out of and in the course of employment has been
11 properly evaluated yet. The record instead reflects several delays and obstacles in the parties’ attempts to
12 obtain a valid QME panel to evaluate the claim.

13 In lieu of returning the parties to the QME panel process, the parties will be ordered to attempt to
14 agree to an AME within 10 days (plus 5 days for mailing) of issuance of this decision. If the parties are
15 unable to agree to an AME within that time period, the WCJ may appoint a regular physician to evaluate
16 the claim pursuant to section 5701.

17 In conclusion, we will grant removal, rescind the F&O and substitute a new finding of fact that all
18 four QME panels are invalid. We will also order the parties to agree to an AME or, if the parties are
19 unable to agree to an AME, the WCJ may appoint a regular physician to evaluate the claim.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's Petition for Removal of the Findings and Order issued by the
3 WCJ on December 3, 2018 is **GRANTED**.

4 **IT IS FURTHER ORDERED** as the Decision After Removal by the Workers' Compensation
5 Appeals Board that the Findings and Order issued by the WCJ on December 3, 2018 is **RESCINDED** in
6 its entirety and the following is **SUBSTITUTED** in its place:

7 **FINDING OF FACT**

- 8 1. All four QME panels issued to date (numbers 7119810, 2114166,
9 7136113 and 2147133) are invalid.

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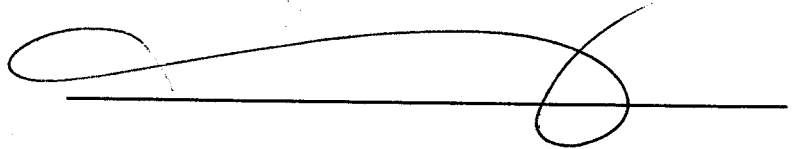
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ORDERS

IT IS HEREBY ORDERED that:

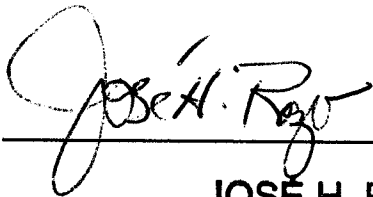
1. The parties will attempt to agree to an AME to evaluate the contested issues within 10 days of this decision (plus 5 days for mailing).
2. If the parties are unable to agree to an AME pursuant to the above order, then the WCJ may appoint a regular physician to evaluate the claim pursuant to section 5701.

WORKERS' COMPENSATION APPEALS BOARD

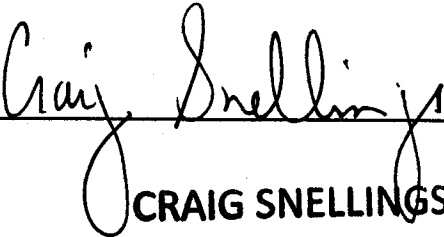


MARGUERITE SWEENEY

I CONCUR,



JOSE H. RAZO



CRAIG SNELLINGS



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 16 2019

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

**ANITA CAMPBELL
LAW OFFICES OF GEORGE FOGY
LENAHAN, LEE, SLATER, PEARSE & MAJERNIK**

AI/pc

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

CASE NUMBER: ADJ10856280

JOHN CAMPBELL
DECEASED

-vs.-

CITY OF RED BLUFF FIRE
DEPARTMENT, PERMISSIBLY SELF-
INSURED; AS ADMINISTERED BY
YORK RISK SERVICES GROUP, INC.;

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Mary Sulprizio

DATE: 1/02/2019

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I.
INTRODUCTION

- | | | |
|-----------------------------|---|--------------------------------------|
| 1. Applicant's Occupation | : | Fire Captain |
| Applicant's Age | : | 56 |
| Date of Injury | : | Continuous Trauma through 11/30/2016 |
| Parts of Body Injured | : | Prostrate Cancer |
| 2. Identity of Petitioner | : | Applicant |
| Timeliness | : | The petition was timely |
| Verification | : | The petition was verified |
| 3. Date of Findings & Order | : | 12/03/2018 |

II.
FACTS

Applicant John Campbell, born _____ and now deceased as of 9/02/2018, while employed during the period through 11/30/2016, as a fire captain in Red Bluff, CA by the City of Red Bluff, claimed to have sustained injury arising out of and in the course of his employment in the form of prostate cancer.

At all times relevant to this case, the City of Red Bluff was/is permissibly self-insured with York Risk Services Group, Inc. administering workers' compensation claims.

The parties could not agree upon an Agreed Medical Examiner, so requested an internal medicine panel. Panel 7119810 issued 6/15/2017. Both parties struck doctors; however the remaining doctor could not set an initial evaluation within sixty (60) days.

A second panel was requested. Panel 2114166 issued on 8/09/2017. This panel consisted of Raye Bellinger, M.D.; Tet Toe, M.D. and Thomas Allems, M.D. Both parties struck doctors; however the remaining doctor could not set an initial evaluation within sixty (60) days.

A third panel was requested. Panel 7136133 issued on 9/07/2017 consisting of Juan Larach, M.D.; Raye Bellinger, M.D. and Roger Nacouzi, M.D. Applicant struck Raye Bellinger, M.D. Defendant requested a fourth panel indicating their strike on the panel request. Panel 2147133 issued on 11/01/2017.

In the meantime, Applicant scheduled an evaluation with Dr. Nacouzi, who examined Applicant on 11/7/2017 and issued a report on 11/28/2017.

III. **TRIAL**

Trial on the sole issue of which panel is the legal panel, was originally held on 2/28/2018. An opinion issued on 4/26/2018; however, Applicant filed a Petition for Reconsideration on an issue that was not raised at trial and the undersigned felt it necessary to rescind the decision to allow Defendant time to respond. The matter was set for conference.

Following two requests for continuance, the parties met for hearing on 8/20/2018 and completed a Pre-Trial Conference adding additional issues as follows:

1. Whether the panel request that resulted in Panel 7136113 (3rd panel), was properly obtained as an original panel,
2. Whether the Applicant waived an objection to the first and second panels by not raising the issue of the improper claim number before the first Petition for Reconsideration,
3. Whether Defendants were required to strike per Labor Code §4062.2 or if Defendant's selection of Dr. Larach from Panel 7136113 effectively struck Dr. Nacouzi,
4. Whether Applicant waived an objection to Panel 7136113 by not raising the issue before the first Petition for Reconsideration.

The case was submitted for decision on 8/29/2018; however, following Applicant Counsel's 9/26/2018 correspondence advising of the death of Applicant, the undersigned issued a Notice of Intention to Dismiss the Case due to the death. Applicant objected as the issue of potential benefits

due up to Applicant's death remained unresolved. An Order Dismissing the Case and Applicant's objection apparently crossed in the mail. The Order Dismissing was then rescinded.

The matter was set for telephonic phone conference at which both parties requested the issues be resubmitted for decision. An Order Re-Submitting the case for decision issued on 11/02/2018.

A decision then issued on 12/03/2018 finding the 4th panel the legal panel.

IV. PETITION FOR REMOVAL

Removal is an extraordinary remedy where both substantial prejudice and also irreparable harm must be demonstrated.

Here, Applicant first states "the logical thing to do", rather than a demonstration of either prejudice or harm. Yes, Dr. Nacouzi is the only medical-legal doctor to evaluate Applicant while he was alive; however, now a review of all the medical records can be accomplished in a much shorter period of time without either substantial prejudice or irreparable harm. The issue of prejudice or harm is somewhat premature as no one knows whether another medical-legal doctor will decide in the same way as Dr. Nacouzi.

Further and for the same reasons, there is no rationale as to why reconsideration would not be an appropriate or adequate remedy after a final order.

A. Whether Applicant waived an objection to the first and second panels by not raising the issue of the improper claim number before the first Petition for Reconsideration

On 6/15/2017, Panel 7119810 issued (the first panel). Both parties timely struck, but the remaining doctor could not set within sixty (60) days. A second panel was requested, without any objection, and Panel 2114166 issued on 8/09/2017. Again both parties timely struck and again the remaining doctor could not set within sixty (60) days.

A third panel was requested; however it was requested online as an original panel and not a replacement. Panel 7136133 issued on 9/07/2017 and Applicant issued a strike of Dr. Bellinger on 9/08/2017. On 9/28/2017, Defendant wrote Applicant's Counsel objecting to any appointment with Dr. Larach. Defendant, also on 9/28/2017, requested a replacement panel due to the remaining doctor not being able to set an evaluation within sixty (60) days, without any objection from Applicant.

It is clear and Defendant does not dispute that the wrong claim number was on the first two panel requests. However, Applicant received the first two panels and issued strikes without any objection. Further, after issuance of the third panel with the correct claim number, Applicant still participated in the strike process. There was no objection from Applicant as to the claim number.

Further, there was no substantial prejudice or irreparable harm to Applicant – Applicant received the panels and participated in the process. Applicant cannot now call foul after he has been a willing participant in the process.

Applicant first raised the issue of the improper claim number after the original Opinion on Decision issued, which is too late. In the case of James Hollingsworth, M.D. v. Workers Compensation Appeals Board¹, the issue was much more important than an improper claim number. There, Applicant had filed a continuous trauma claim of industrial injury through 2/01/1988. The case subsequently settled by stipulation. Thereafter, Applicant filed another continuous trauma through 9/30/1991 along with a Petition to Re-Open the previous claim. A medical-legal evaluation found no industrial causation for the later claim. On the day of trial and not before, Applicant raised the issue of whether his employment as a psychiatrist/assistant warden would entitle him to the presumption of injury under Labor Code §3212.2. The WCJ did not allow the issue because it was not raised at the Mandatory Settlement Conference, nor identified as an issue in the Pre-Trial Conference Statement.

Applicant filed a Petition for Reconsideration which was denied. Applicant then filed a Petition for Writ of Review which was also denied. On an issue which was not timely raised, such issue can be waived.

The instant case is more egregious because not only did Applicant not raise the issue, he participated in the process for all three panels and did not once object.

Similarly, in Myrna Medina v. County of Los Angeles², industrial injury, temporary total disability and further medical treatment were awarded after trial. Defendant filed a Petition for Reconsideration claiming the WCJ issued a decision regarding Applicant's injuries without allowing Defendant to complete the QME process which, in effect, denied Defendant's due process rights. The Commissioners agreed with the WCJ that there was no evidence that either the issue of

¹ 61 Cal. Comp. Cases 715, 1996 Cal. Wrk. Comp. LEXIS 3233 (Cal. App. 2d Dist. June 20, 1996)

² Myrna Medina v. County of Los Angeles, ADJ8343056, panel decision 11/05/2012.

completing the QME process nor the due process issue had been raised at trial. Defendant's petition for reconsideration was denied.

Medina is similar to the instant situation. In Medina a strategic decision was made to proceed without a medical-legal evaluation rather than obtain a revised panel list when it discovered one of the panel doctors had been a treating doctor. Here, Applicant chose to proceed with strikes on three panel lists rather than object to the faulty claim number.

In both cases, there was no mention of the issue at the Mandatory Settlement Conference, no mention in the Pre-Trial Conference Statement and no mention at trial. The issues were first raised in a Petition for Reconsideration, in violation of Labor Code §5502 (d)(3):

"If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

Applicant's attorney was fully aware of the incorrect claim numbers as the issue was mentioned in Defendant's 10/13/2017 correspondence to Applicant's Counsel³, yet chose not to raise the issue on the Pre-trial Conference Statement or during the Mandatory Settlement Conference.

By proceeding with the process through the first three panels, including making strikes without any objection, Applicant waived the right to object. Further and given that Applicant's Counsel was aware of the issue months prior to completing the Pre-Trial Conference Statement and did not include that as an issue, the issue is not admissible pursuant to Labor Code §5502 (d)(3).

B. Whether Applicant waived an objection to Panel 7136113 by not raising the issue before the first Petition for Reconsideration

The discussion regarding whether Applicant waived an objection to Panel 7136113 by not raising the issue before the first Petition for Reconsideration is entirely repetitive of the above discussion regarding whether Applicant waived an objection to the first and second panels by not raising the issue of the improper claim number before the first Petition for Reconsideration. It is not necessary to repeat the discussion when the question just substituted "Panel 7136113" for "the first and second panels".

³ Defense Exhibit D.

C. Whether the panel request that resulted in Panel 7136113 was properly obtained as an original panel

Both panels 7113810 (first panel issued 6/15/2017) and 2114166 (second panel issued 8/09/2017), were submitted using an incorrect claim number. Neither party objected to the incorrect claim number and it appears that incorrect claim number did not create any substantial prejudice or irreparable harm to either side. Both parties received both panel lists and both parties participated in strikes. In both instances, the remaining doctor could not set within sixty (60) days and neither party waived time.

Defendant requested the first replacement. Applicant requested the second replacement but it was done as an original request for a panel and not as a replacement. Possibly if a replacement had been requested rather than an original, there would not have been a repetitive physician name on the third panel. The parties were forced to issue strikes on only two doctors, or as Applicant did, use their strike on a doctor who should not have been on the list. Further, if there was additional harm, it was to the Medical Unit who is charged with keeping track of the panel requests. The panel was not properly obtained.

D. Whether Defendants were required to strike per Labor Code 4062.2 or if Defendant's selection of Dr. Larach from Panel 7136133 effectively struck Dr. Nacouzi

Technically Panel 7136113 was at least partially invalid because Raye Bellinger, M.D., on the third panel, had also been listed on the second panel, 2114166. Under California Code of Regulations §31.5 (a)(5), the parties had a right to a replacement panel, which Defendants requested, albeit using a different rationale.

Actually Defendants had three separate reasons for obtaining a fourth panel. As stated above, Panel 7136113 was not correctly obtained due to being requested as an original panel rather than a replacement panel. Second, Dr. Bellinger who was listed on Panel 2114166 and was also listed on Panel 7136113. Third, after Applicant's strike of Dr. Bellinger, Defendant did request a replacement panel indicating that Dr. Nacouzi was struck in the QME process and the remaining doctor, Juan C. Larach, M.D. could not set within sixty (60) days.

While Applicant has questioned basically the nature of a proper strike, *Richard Gaines v. City of*

Fresno⁴ discusses this issue. After not being able to agree on an Agreed Medical Evaluator, the parties therein obtained a three member panel. In a phone conversation, Defendant advised he was striking Dr. Fisher. Applicant then struck Dr. Miller; however did so in a letter to the Medical Unit which was not served on Defendant until sometime later. Applicant then scheduled an evaluation with the remaining physician, Dr. Lundeen. The Commissioners phrased the sole issue as, "whether applicant's December 3, 2007 letter to the Medical Unit objecting to Dr. Miller was effective to strike Dr. Miller from the QME panel, leaving Dr. Lundeen as the evaluator, or whether applicant's failure to serve the objection on defendant in a timely manner means defendant may choose Dr. Miller". Defendants Petition for Reconsideration was dismissed and the Petition for Removal was denied because Applicant's letter to the Medical Unit was considered an appropriate strike. Here, the issue is the same.

Examining Labor Code §4062.2, the drafters did not include any specific language regarding the specific form a strike is supposed to take. The section just says "Within 10 days of assignment of the panel by the administrative director, each party may strike one name from the panel." It does not specify the method of the strike; however, in Gaines, the Commissioners did discuss the timeliness of the strike and letter to the Medical Unit. Here, while again the parties did not seek to admit the email strings between them on this issue, it appears that the request for a replacement panel may not have been made within ten days of the issuance of the panel list.

However, CCR §31.5 (b) states:

"Whenever the Medical Director determines that a request made pursuant to subdivision 31.5(a) for a QME replacement or QME panel replacement is valid, the time limit for an unrepresented employee to select a QME and schedule an appointment under section Labor Code section 4062.1(c) and the time limit for a represented employees to strike a QME name from the QME panel under Labor Code section 4062.2(c), shall be tolled until the date the replacement QME name or QME panel is issued."

It would thus appear that once the Medical Director accepted Defendant's request for a replacement panel, the time to strike was tolled until at least 11/01/2017 when the fourth panel (2147133) issued. However, at that point, the parties both began the litigation process on this issue and both stopped any further strikes.

⁴ Richard Gaines v. City of Fresno, 2008 Cal. Wrk. Comp. P.D. LEXIS 826

V.
CONCLUSION

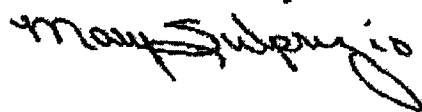
As to the four presented issues:

1. Applicant did waive an objection to the first and second panels by both not raising the issue of the improper claim number before the first Petition for Reconsideration and also for participating in the first three panels without any objection to the validity of the panels.
2. Applicant did waive an objection to Panel 7136113 by both not raising the issue of the improper claim number before the first Petition for Reconsideration and also for participating in the first three panels without any objection to the validity of the panels.
3. Panel 7136113 (third panel) was improperly obtained as an original panel. It was also not a proper panel because it included the name of a physician who had been listed on Panel 2114166 (second panel).
4. Defendants strike of Dr. Nacouzi on its request to the Medical Director was an effective strike of Dr. Nacouzi.

VI.
RECOMMENDATION

Because the decision which issued on 12/03/2018, did not respond to all issues cited in the Pre-Trial Conference Statement and the Minutes of Hearing, it is respectfully recommended that the Petition be granted and the Opinion of 12/03/2018 be revised to the above conclusions.

DATE: 1/02/2019



Mary Sulprizio
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE