

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

**LORENZO AREVALO, *Applicant***

**vs.**

**LIMONEIRA COMPANY, INC., MAIN LIMONEIRA CO.; ZURICH AMERICAN  
INSURANCE COMPANY administered by GALLAGHER BASSETT SERVICES, INC.,  
*Defendants***

**Adjudication Numbers: ADJ14549823; ADJ14549350  
Oxnard District Office**

**OPINION AND 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 based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will deny removal.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, based upon the WCJ's analysis of the merits of petitioner's arguments, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



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

**APRIL 27, 2022**

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

**LORENZO AREVALO  
LAW OFFICES OF THOMAS ANDERSON  
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN  
THE LAW OFFICES OF JOAN SHEPPARD**

**PAG/pc**

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

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

CASE NUMBER: ADJ14549350; ADJ14549823

LORENZO AREVALO

-vs.-

LIMONEIRA COMPANY,  
MAIN LIMONEIRA CO;  
ZURICH AMERICAN  
INSURANCE COMPANY,  
administered by  
GALLAGHER BASSETT

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE:

Sandra Rosenfeld

DATE:

February 22, 2022

**JOINT REPORT AND RECOMMENDATION ON REMOVAL**

The Workers' Compensation Judge ("WCJ") presided over an MSC on February 3, 2022, at which time, over defendant's Zurich American Insurance Company, administered by Gallagher Basset's objection, set the matters for trial, and approved applicant's election against them in the cumulative trauma injury, case number ADJ14549823. Defendant Gallagher Bassett administrator for Zurich American Insurance Company, hereinafter, "Petitioner," has filed a timely and verified "Petition for Removal" pursuant to CCR § 10843, against the election.

The matters were initially set for trial on February 24, 2022 before Judge Carero. However, pursuant to a continuance request filed by applicant's attorney on February 10, 2022, including a reassignment to a different judge due to a conflict with Judge Carero, the matter has been rescheduled to March 30, 2022, before the undersigned, by the Presiding Judge Hjelle.

## I. CONTENTIONS

Petitioner argues that they will be significantly prejudiced by the election order, since they will be required to administer benefits for a claim in which they have minimal liability, and that the order should be rescinded.

## II. FACTS

The applicant filed two applications for adjudication of claims on April 23, 2021; a specific date of injury pled to have occurred on February 27, 2020, to his right knee (ADJ14549350), and a cumulative trauma claim pled from January 1, 2004 through February 28, 2020, also to his knee (ADJ14549823). Both of the applications list petitioner as the claims' administrator. Petitioner provided coverage from January 1, 2020 through February 28, 2020, which encompasses the last part of the CT, and the specific injury. Petition for Removal, February 7, 2020, page 2, lines 6-7.

On May 10, 2021, the defense firm of Hanna Brophy entered their appearance on behalf of petitioner, and filed answers on both claims. Both Answers are the same, and include denials of the injuries pursuant to a statute of limitations defense. Answer to Application for Adjudication of Claim, May 10, 2021, filed in EAMS in both ADJ14549350 and ADJ14549823.

Petitioner also filed a "Petition for Joinder," on May 6, 2021 in the cumulative trauma case (ADJ14549823), requesting that California Insurance Company, administered by Applied Risk, be joined, based on their coverage of the CT "during the period 02/28/2017 – 12/31/2019." Petition for Joinder, May 6, 2021, pages 1-2.

Judge Carero approved the petition, and issued an "Order for Joinder" of Applied Risk on May 17, 2021.

Approximately five and a half months later, applicant's attorney filed a "Petition for Election against Zurich American Insurance Company," on November 8 2021. In said petition, applicant's attorney noted that a Panel QME, Dr. Falkinstein had been selected with Zurich, and he had issued a report on July 23, 2021, finding that the applicant had sustained a cumulative trauma injury, and first suffered disability on February 28, 2020. Petition for Election against Zurich American Insurance Company," November 8, 2021, page 1, lines 19-28. Applicant's attorney requested that in "order to facilitate resolution of the applicant's claim, this motion for an election against Zurich is made." Id. at page 2, lines 9-10.

Petitioner lodged an objection to the election petition on November 11, 2021, acknowledging that both petitioner and Applied Risk were the proper carriers on the CT, but that pursuant to *Barillas v. Cellar Masters, Inc.*, 2014 Cal.Wrk.Comp. P.D. LEXIS 452, because petitioner has 15.6% of the exposure, they should not be elected against. Objection to Petition for Election against Zurich American Insurance Company, November 11, 2021, page 3, lines 19-22. Further, that co-defendant Applied Risk had obtained a panel QME list on October 5, 2021, and that it "would be inequitable for the WCAB to limit the discovery rights of the defendant with the majority of liability given that

they have the most incentive to appropriately adjust the applicant's benefits." Id. at page 4, lines 4-6.

Judge Carero approved the election against petitioner via Order dated November 12, 2021.

Petitioner then filed a "Petition for Removal," on November 19, 2021, raising the same arguments outlined in their objection to the election, and that the Order should be rescinded because petitioner would be "significantly prejudiced." Petition for Removal, November 19, 2021, page 5, lines 2-5.

Applicant's attorney responded via an "Answer to Petition for Removal," on December 8, 2021, arguing in part that petitioner had not shown that the election would result in harm or cause substantial prejudice to them. Answer to Petition for Removal, December 8, 2021, page 3, lines 11-4. Further, applicant's attorney outlined the discovery and communication that had occurred with petitioner as follows:

"In this case, as between the applicant and Zurich American Insurance Co., there is a final report from a Qualified Medical Evaluator, the report of Dr. Falkinstein dated July 23, 2021. (EAMS Doc ID #74589366) No objection to that report has been made by or on behalf of Zurich American Insurance Co., and no deposition of Dr. Falkinstein has been scheduled by that defendant. In fact, by way of a letter dated August 25, 2021 counsel for Zurich American Insurance Co. proposed that the parties (the applicant's attorney and counsel for the two defendants) meet and confer to discuss the case in light of Dr. Falkinstein's findings."

Id. at page 2, lines 13-20.

In regards to the above discovery with petitioner, applicant's attorney noted that co-defendant California Insurance Company/Applied Risk was "nowhere near that stage..." and that they had "refused to discuss settlement based on the reporting of Dr. Falkinstein...obtained its own Panel, and...scheduled and has now cancelled an appointment with the Qualified Medical Evaluator from that second Panel." Id. at page 2, lines 21-26. Applicant's attorney argued that requiring it to elect against California Insurance Company/Applied Risk, would "only delay the case in which the applicant has received no benefits despite the compensable reporting of Dr. Falkinstein and Zurich American Insurance Co.'s lack of objection to it." Id. at page 3, lines 1-3.

Following the above pleadings, Judge Carero issued an "Order Rescinding Order Allowing Election," noting "good cause," following the filing of the removal, on December 6, 2021.

Approximately one month later, on January 13, 2022, applicant's attorney filed a Declaration of Readiness, requesting an MSC on several issues, including "AOE/COE," and listed Dr. Falkinstein's July 23, 2021 report as the medical upon which they were relying, and the following under good faith efforts made to resolve the dispute:

"Defendant denied applicant's injury, parties went to QME Falkinstein per LC 4060, Dr. Falkinstein found injury compensable in report of 7/23/2021, four months later defendant not providing benefits."

Declaration of Readiness to Proceed, January 13, 2022.

Both defendants filed Objections to the DOR. Applied Risk Services filed their objection on January 19, 2022, arguing that Dr. Falkinstein was not their Panel QME, and that they were “still completing its discovery process and, to that end, has a PQME evaluation set with Dr. Burge on 02/18/22.” Objection to Declaration of Readiness to Proceed, January 19, 2022, page 2, lines 1-3.

Petitioner filed an Objection to the DOR, dated January 19, 2022, on January 27, 2022, arguing that setting the matter for trial “would deprive Co-Defendant of its discovery rights.” Objection to Declaration of Readiness, January 19, 2022, page 2, line 4. Further, that co-defendant had canceled their PQME exam because of the election that had been approved and then rescinded, and that “Applicant’s actions caused an unnecessary discovery delay, which he is attempting to use to his benefit.” Id. at page 2, lines 5-9.

Applicant’s attorney filed a “Petition for Automatic Reassignment” when the matter was set before Judge Carero, due to a conflict. Accordingly, the MSC was re-set before the undersigned on February 3, 2022.

At the February 3, 2022 MSC, the undersigned judge had extensive discussions with the parties regarding the election issue, and the Panel QME reporting of Dr. Falkinstein. The election against petitioner was approved over their objection, and the matters set for trial. The following was written in the MOH, under “Other Comments,” reflecting petitioner’s objection that the election had been issued with no evidentiary record:

“Parties to EFILE PTCS & Exhibits 20 days B/F trial. AA’s Election against Zurich is approved over Def’s objection B/C of no evidentiary rec.”

Minutes of Hearing, February 3, 2022.

Petitioner’s “Petition for Removal” was filed thereafter, and applicant’s attorney filed a response on February 12, 2022.

### III. DISCUSSION

#### PERCENTAGE OF COVERAGE AND CODEFENDANT’S DISCOVERY:

Petitioner’s main argument for why the election is improper is that they only have 15.9% of the coverage of the CT claim, and rely on the case of *Barillas v. Cellar Masters, Inc.*, 2014 Cal.Wrk.Comp. P.D. LEXIS 452. Specifically, that “this court should consider the same standard: ‘the carrier with the lion’s share of the liability will have the most incentive to appropriately adjust benefits.’” Petition for Removal, page 5, lines 4-6.

In the *Barrillas* case, the WCJ issued a Findings and Award in a cumulative trauma injury, finding Security and Zurich “jointly and severally liable,” and ordered Zurich, which had 9% of the liability to administer the benefits. *Barrillas*, 2014 Cal.Wrk.Comp. P.D. LEXIS 452, 3. Zurich filed a

Petition for Reconsideration, which was granted, and the WCAB noted the following in their decision:

“The WCJ selected Zurich to administer the award because it was the ‘end carrier during the continuous trauma period.’ (Report, at p. 1) However, we are persuaded that, absent an otherwise compelling reason, a balance of the proportionate share of liability between carriers is a more relevant criterion for selecting an administrator than the sequence.”

Id. at 6.

Thus, the court did not find that the *only* factor to consider is the carrier’s liability portion, but that it was a factor to be considered absent “compelling reasons.” Here, unlike the defendant in *Barrillas*, petitioner was not selected simply because it was the “end carrier,” but rather due to additional compelling reasons.

Specifically, as petitioner acknowledges, the parties proceeded to Dr. Falkinstein as their Panel QME in July of 2021. Parties at the MSC advised the undersigned that Dr. Falkinstein had found injury on a cumulative trauma basis. Further, as petitioner notes in their removal, Dr. Falkinstein found that there had been no specific injury on February 27, 2020, which solely falls within petitioner’s coverage. Thus, unlike the carrier in *Barrillas*, petitioner herein has coverage of two denied claims, for which it proceeded to a Panel QME pursuant to L.C. § 4060 to address same. Therefore, these are the compelling reasons as to why the election was approved.

Further, since the report issued in July of 2021, petitioner has taken no action to either object to said reporting, or to accept the CT claim and administer benefits to the applicant. Instead, petitioner argues that the applicant should now undergo a second Panel QME exam, by a carrier who has not conducted any discovery.

Specifically, petitioner argues that “it would be inequitable for the WCAB to limit the discovery rights of the defendant with the majority of liability,” in regards to Applied Risk, and that they should proceed to their own Panel QME. However, this runs counter to petitioner’s own acknowledgment that both defendants are the proper carriers on the CT pursuant to L.C. § 5412 and L.C. § 5500.5:

“There are no medical reports in existence to support both compensable disability and knowledge of an industrial injury prior to 02/27/2020. Therefore, liability pursuant to LC § 5500.5 will span the period 02/27/2019 – 02/27/2020. Insurance coverage for the employer was provided by Applied Risk from 02/27/2019 – 12/31/2019 (307 days) and Gallagher Bassett (58 days) during this period.

Petition for Removal, February 7, 2022, page 4, lines 4-8.

Accordingly, there is no additional discovery to be conducted by co-defendant Applied Risk given that liability is clear pursuant to L.C. § 5412, L.C. § 5500.5, and the panel QME findings of Dr. Falkinstein. While there is case law to support each defendant obtaining their own panel QMEs in a CT claim, here, the applicant is receiving no benefits, despite a compensable report having been

issued by a panel QME. Further, to have the applicant undergo a second panel exam, and wait several more months before he receives any benefits, is inequitable in light of the facts herein.

Accordingly, there is no harm or prejudice to petitioner in light of the above and as a result of the election.

Therefore, the election is proper and valid.

**RECOMMENDATION:**

It is recommended that the Petition for Removal be denied.

DATE: February 22, 2022

/S/SANDRA ROSENFELD

**Sandra Rosenfeld**

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

**SERVICE:**

HANNA BROPHY ORANGE, US Mail

THOMAS ANDERSON OXNARD, US Mail

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

ON: 02/22/2022

BY: 