WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SOCORRO GONZALES, ***Applicant,*** **vs.** **ABM INDUSTRIES; ESIS,** ***Defendants.***	**Case No. ADJ10301756** **(Oakland 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 for the reasons stated in the WCJ's report which we adopt and incorporate, 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, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) 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, § 10843(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, § 10843(a).) Here, for the reasons stated in the WCJ's report, 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.

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For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

FRANK M. BRASS

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 31 2016

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

FLOYD, SKEREN & KELLY
LAW OFFICES OF GRUNDMAN AND DEANE
SOCORRO GONZALES

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STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board
JUDGE CHRISTOPHER MILLER

Socorro Gonzalez v. ABM Industries
WCAB No. ADJ10301756

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

By timely, verified petition filed on August 15, 2016, defendant seeks removal to the appeals board of the decision filed herein on July 26, 2016, in this case, which arises out of an admitted injury on October 9, 2015. Petitioner, hereinafter defendant, contends in substance that I erred in ordering that the Medical Director of the Division of Workers' Compensation issue a panel of qualified medical evaluators (QMEs) to replace one that included a physician who evaluates "through the use of telehealth," because such procedure has been demonstrated to produce accurate results and does not violate applicable regulations. Applicant has filed an answer, arguing that the Labor Code and regulations promulgated thereunder prohibit anyone other than the QME him- or herself from conducting the physical examination, and that defendant has not suffered substantial prejudice or irreparable harm by the order. I will recommend that removal be denied.

BACKGROUND

The few salient facts are not disputed. Applicant sustained an admitted injury in 2015. After he retained counsel, and unstated dispute arose, and the parties obtained a panel of QMEs in the field of pain management. On that panel, which is appended to the order currently under study, appears Dr. Behzad Emad, who lists a Walnut Creek address, and next to whose name appears "* via telemedicine." The footnote states: "Via telemedicine. Evaluation will take place through the use of telehealth using interactive audio, video, or data

communications." Each party struck one of the other names on the panel (see section 4062.2[1]), leaving Dr. Emad as the QME. Applicant evidently objected and requested a replacement panel.[2] Defendant retained counsel and requested a hearing. At the status conference that took place July 26, 2016, the parties presented their positions orally. Both expressed the understanding that Dr. Emad employs another person (unidentified) to conduct the physical examination portion of the evaluation, with the QME present only electronically. Defendant pointed out that the Medical Director must have approved the process, at least generally, or Dr. Emad would not have been certified as a QME and would not have appeared on the panel. Applicant expressed reservations about an unknown person, with unknown qualifications, participating in his evaluation. After considering the parties' arguments, I issued the order to produce a replacement panel.

DISCUSSION

Little is known, from the QME panel itself, about the nature of "telemedicine" contemplated here. For instance, the possibilities of "interactive audio, video, or data communications" are presented in the disjunctive, meaning that the parties receiving the panel are not informed whether the QME would participate by email, or on a computer screen with camera (with or without audio) or by telephone. However, documents supplied by the office of the Medical Director shed some further light on the process, stating that Dr. Emad supervises a "designee" throughout the examination and that the designee would have a chiropractic license and QME certification and would have completed certain other educational minima. ("QME Via Telemedicine – Requirements – Standard of Care") and attaching a consent form that makes clear that the patient may "refuse to participate in a QME via telemedicine."

[1] All statutory references not otherwise identified are to the Labor Code.
[2] See declaration of readiness to proceed filed May 27, 2016.

Defendant cites two studies, one involving "eye problems" and the other "circulatory and neurologic examination of patients in a pediatric intensive care unit," for the proposition that telemedicine (not otherwise defined) has proven to be accurate and reliable. It contends that the requirement[3] that the evaluation include no less than 20 minutes of "face to face time" may be satisfied by a "live video feed." However, I see no assurance in the available documents that Dr. Emad himself will actually be participating such a live feed; it may be that one of those faces is that of the "designee." Moreover, as applicant points out, the regulation uses the phrase "face to face time *actually spent with the injured worker*" (emphasis added), creating a strong inference that *virtual* face to face time does not qualify. (What else could be meant by "actually"?)

Further, defendant does not address the statutory requirement, with certain minor exceptions not applicable here, that "no person, other than the physician who signs the report...shall examine the injured employee..."[4] The only thing that can be said in support of the process proposed here, in satisfying this requirement, is that it must have been considered when weighing Dr. Emad's QME application. However, his consent form, with its opt-out provision, is the likely result of compromise in granting that application, allowing a waiver of the QME examination. (It also makes this current battle rather moot.)

I must also note that, with the current onslaught of litigation over QME specialties and names, with judges and commissioners spending considerable time counting the days between objections, panel issuance, striking of names, etc., I believe that it is significant that this QME's designee is nowhere identified by name, and only in the doctor's disclosure (which is not provided with the QME panel, only by the physician later) is it revealed that the designee will

[3] Cal. Code Regs., Title 8, § 49.2
[4] § 4628, at subd. (a)

be a chiropractor. Without knowing even that much, how is either party to make a knowing decision?

Finally, applicant's contention that defendant has not demonstrated substantial prejudice or irreparable harm should the order stand has merit, I believe. I fail to see how that prerequisite to removal has been satisfied when the order in question does nothing but generate a second QME panel in the same specialty as the first.

RECOMMENDATION

I recommend that removal be denied.

Respectfully submitted,

Dated: September 8, 2016

CHRISTOPHER MILLER
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVED ON: 9/9/16

SERVED BY: Macap

SERVICE:
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