WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROY NORWOOD, ***Applicant,*** **vs.** **SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, permissibly self-insured, administered by INTERCARE,** ***Defendants.***	**Case Nos. ADJ2458433 (SFO 0509917)** **ADJ3638211 (SFO 0512263)** **ADJ7362994** **ADJ9026581** **(San Francisco 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.

We further note that the Appeals Board's en banc decision in *Navarro v. City of Montebello* (April 2, 2014) 2014 Cal. Wrk. Comp. LEXIS 41 (79 Cal.Comp.Cases) was not final at the time of the February 12, 2014 Mandatory Settlement Conference or at the time the Petition for Removal, answer and WCJ's Report were filed in this matter. However, the Board has issued its final decision in *Navarro* and it supports the WCJ's decision herein.

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For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

DEIDRA E. LOWE

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 21 2014

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

BOXER & GERSON
SAN FRANCISCO CITY ATTORNEY'S OFFICE
ROY NORWOOD

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

Roy Norwood, *Applicant,* v. **City and County of San Francisco/San Francisco Municipal Transportation Agency, Permissibly Self-Insured, Administered by Intercare Roseville,** *Defendants.*	Case No. ADJ2458433 ADJ9026581 ADJ3638211 ADJ7362994 **Report And Recommendation On Petition For Removal**

Defendant, City and County of San Francisco, petitions for an order removing this case to the Appeals Board and setting aside the ruling I made at the mandatory settlement conference of February 12, 2014, (1) denying defendant's motion in ADJ9026581 to order applicant to submit to an evaluation by Alfredo Fernandez, M.D., who was used as the agreed medical evaluator in previous lien cases filed by applicant, in which applicant was represented by different counsel; and (2) ordering the Medical Unit to issue, within 30 days, a pain management QME panel in ADJ9026581.

Defendant contends that it will suffer irreparable harm and prejudice and reconsideration will not be an adequate remedy after the issuance of a final order, if applicant is not required to utilize Dr. Fernandez as an agreed medical evaluator in ADJ9026581 and if applicant is allowed to obtain a pain management QME panel.

Defendant's petition for removal was timely filed and is accompanied by a verification signed by defendant's counsel.

Procedural History

The record shows the following: three Applications for Adjudication of Claim were filed on behalf of applicant, claiming that while employed by the City and County of San Francisco, applicant sustained injuries arising out of and in the course of employment to his neck and left shoulder on February 14, 2007 (ADJ 2458433); neck, left shoulder and back on April 17, 2008 (ADJ3638211); and neck and left shoulder/arm on March 20, 2010 (ADJ7362994). In these cases, applicant was previously represented by Caroline Allen, although in ADJ3638211 applicant was initially represented by Betty Bortin. Ms. Allen and the defendant agreed to utilize Alfredo Fernandez, M.D. as an orthopedic agreed medical evaluator in all three cases.

The parties entered into Stipulations in ADJ 2458433 and ADJ3638211, which were approved on March 23, 2010 by Judge Zalewski. Applicant is also now *in propria persona* in these two cases.

In 2012, applicant substituted Ms. Allen out of ADJ7362994, the only case remaining of Ms. Allen's three cases, and replaced her with Marina Ramos Wynn. In June, 2013, applicant substituted Ms. Wynn out of the case in order to represent himself *in propria persona,* which remains his current status.

On July 29, 2013, applicant filed a fourth Application for Adjudication of Claim in ADJ9026581 through his new attorney, Arjuna Farnsworth at Boxer and Gerson, alleging that while employed by the City and County of San Francisco, he sustained injury to the bilateral shoulders during the period from April 17, 2011 to October 18, 2012.

On July 17, 2013, defendant filed a Declaration of Readiness to Proceed in ADJ7362994, ADJ2458433 and ADJ3638211, the three cases in which applicant is *in propria persona*, requesting an order that "applicant be required to attend an AME re-evaluation with Dr. Fernandez." It is not clear why the order was requested in all three cases as applicant had

already settled ADJ2458433 and ADJ3638211 and there appeared to be no pending issues in those cases. The DOR was not filed in ADJ9026581, the case in which applicant is represented by Mr. Farnsworth, nor was Mr. Farnsworth served with the DOR by defendant.

A status conference was held in ADJ7362994, ADJ2458433 and ADJ3638211 on September 18, 2013 before Judge Duncan. Applicant appeared *in propria persona*. The matter was continued to January 6, 2014 based on applicant's statement that he might obtain representation.

At the status conference on January 6, 2014 before Judge Duncan, which was set in ADJ7362994, ADJ2458433 and ADJ3638211, applicant again appeared *in propria persona*. Judge Duncan signed an order requiring applicant to "attend the re-evaluation with AME, Dr. Alfredo Fernandez, set for 2-27-14." In addition, the order stated, "Cases ADJ7362994, ADJ2458433 and ADJ3638211, for which applicant is presently unrepresented, are consolidated for hearing with ADJ99026581, for which he is represented by attorney Arjuna Farnsworth, and already set for status conference before Judge Lehmer on 2/12/14 at 1:30."

At the status conference before the undersigned on February 12, 2014, Mr. Farnsworth appeared for applicant in ADJ99026581. Mr. Farnsworth confirmed that he was not representing applicant in ADJ7362994, ADJ2458433 and ADJ3638211; applicant was *in pro per* in those cases. Mr. Farnsworth advised that his client had not filed a petition to reopen any of the two cases already settled in which his client was *in pro per*. He further advised that ADJ7362994, in which applicant was *in pro per*, was still pending as it had never been resolved.

Defense counsel, Christopher Chen, argued at the status conference on February 12, 2014 that Judge Duncan's order of January 6, 2014 requiring applicant to attend the AME reevaluation with Dr. Fernandez on February 27, 2014, applied not only to the three cases which were set in front of Judge Duncan that day, but also to ADJ99026581, even though the

latter case was not on calendar that day and applicant's counsel on that case, Mr. Farnsworth, was not in attendance at the conference.

Mr. Chen also argued that Labor Code section 4062.3(k) required applicant to return to Dr. Fernandez on any medical issues in all **four** of applicant's cases, not just the three cases in which Dr. Fernandez was the AME.

Mr. Farnsworth argued that in ADJ99026581, he did not agree to utilize Dr. Fernandez as an AME. In fact, on August 23, 2013 he had requested the Medical Unit to appoint a pain management QME panel. Defendant had objected to the request. According to Mr. Farnsworth's representations, the request was rejected by the Medical Unit on other grounds on January 16, 2014. Mr. Farnsworth renewed his request to the Medical Unit on January 28, 2014 but had not yet received a QME panel. At the status conference on February 12, 2014, I ordered the Medical Unit to issue a pain management panel.

Judge Duncan's Order at the Status Conference on January 6, 2014 Requiring Applicant to Attend a Reevaluation with "AME Dr. Fernandez" Did Not Apply to ADJ99026581, When That Case Was Not On Calendar, Applicant's Counsel in That Case Was Not in Attendance and Dr. Fernandez Was Not an AME in That Case

Ex parte communication with the appeals board or its judges is prohibited. Pursuant to California Code of Regulations, title 8, section 10213(b), and reiterated in section 10324(c), "No party or lien claimant shall discuss with the workers' compensation administrative law judge the merits of any pending case without the presence of all necessary parties to the proceeding, except as provided by these rules." The Court of Appeal has acknowledged that ex parte communication with the judge is prohibited because it "denies those persons legally

interested in the preceding the full right to be heard according to the law." (*Fremont Indemnity Co. v. Workers' Comp. Appeals Bd. (Zepeda)* (1984) 49 Cal.Comp.Cases 288, 294-295.)

According to defendant, Judge Duncan's order of January 6, 2014 requiring applicant to attend a reevaluation with "AME Dr. Fernandez" applied to ADJ99026581, even though the case was not set that day, applicant's counsel in that case was not present and Dr. Fernandez was not an AME in that case. If on January 6, 2014, defense counsel did in fact intend to request the order in ADJ99026581, defendant would have been in strict violation of California Code of Regulations, title 8, sections 10213(b) and 10324(c) by engaging in a prohibited ex parte communication with the judge.

The minutes of hearing for the status conference on January 6, 2014 only list the three cases in which applicant is *in pro per.* Case ADJ99026581 is not listed on the minutes. There is no evidence that Judge Duncan intended to order applicant to see Dr. Fernandez as an AME in ADJ99026581.

Applicant Is Not Required to Utilize Dr. Fernandez in All Future Cases Filed Against the City and County of San Francisco Alleging Injury to His Left Shoulder

Defendant asserts that Labor Code section 4062.3(k) requires applicant to utilize Dr. Fernandez as the agreed medical evaluator in ADJ99026581 since applicant previously utilized Dr. Fernandez as an AME.

Labor Code section 4062.3(k) states:

> "If, after a medical evaluation is prepared, the employer or the employee subsequently objects to any new medical issue, the parties, to the extent possible, shall utilize the same medical evaluator who prepared the previous evaluation to resolve the medical dispute."

This Labor Code section does not specifically require the use of the same agreed medical evaluator in any and all future cases filed by the applicant. If such were the case, then

once an injured worker undergoes a qualified medical evaluation, whether by agreed medical evaluator or panel qualified medical evaluator, he or she would be bound to return to that evaluator on any issues in any future cases involving the same body parts, in other words, "for life." It is doubtful that this was the intent of the legislature. The more likely intent was that if new issues arise in the same case, the parties are to use the same medical evaluator to the extent possible.

In the recently issued but not yet finalized case of *Ismael Navarro v. City of Montebello*, ADJ6779197, ADJ7472140 and ADJ7964720, filed and served on February 27, 2014, the Appeals Board issued an Opinion and Order Granting Removal and a Notice of Intention to Submit for Decision (En Banc). As that decision is not final, it is not binding authority, but the reasoning therein is persuasive. The Appeals Board has indicated that it intends to find that the Labor Code does not require an employee to return to the same panel QME to evaluate a subsequent claim of injury. The Appeals Board also intends to find that the requirement in California Code of Regulations, title 8, section 35.5(e) that an employee return to the same evaluator when a new injury or illness is claimed involving the same parties and the same body parts is inconsistent with the Labor Code, and therefore invalid. It was further stated that the Appeals Board intends to find that while the parties are not precluded from agreeing to the same evaluator for new claims of injury to the same body parts, they are not required to do so for injuries that were reported after the evaluation has taken place.

The instant case does not involve a panel QME, but rather an AME. If one follows the above line of reasoning presented by the Appeals Board, then it seems that if an injured worker is not required to return to the same **panel QME** in a future claim involving the same parties, it would be even less likely that he or she would be required to return to an **agreed medical evaluator** used in a prior case, since by definition, an AME is a doctor who is agreed upon by the parties.

In its petition for removal, defendant references two prior judge decisions involving the City and County of San Francisco in which it asserts that the judge denied its request to utilize a different evaluator with facts similar to those herein. However, a decision from another workers' compensation judge is not binding precedent. According to defendant, in one of those cases, the parties utilized an agreed medical evaluator. Subsequently, after the injured worker passed away, the defendant requested a new medical legal evaluator. The request was denied. The facts in that case are different than those in this case, since in that case, the defendant was trying to withdraw from its agreement to utilize an agreed medical evaluator. In this case, there was no agreement to use an AME.

Recommendation

For the foregoing reasons, I recommend that the petition for removal of defendant, City and County of San Francisco, filed herein on February 26, 2014, be **DENIED**.

Francie R. Lehmer

Francie R. Lehmer
Workers' Compensation Judge
Workers' Compensation Appeals Board

SERVICE:
The Report and Recommendation on Petition for Removal was filed and served on all parties listed in the Official Address Record.

Date: March 12, 2014
By: Amy Tang