

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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5 **SHARON ADAMS,**

6 *Applicant,*

7 **vs.**

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9 **MERCED CITY SCHOOL DISTRICT,**
10 **Permissibly Self-Insured, Adjusted by**
11 **INTERCARE,**

12 *Defendants.*

Case No. **ADJ8677937**
(Stockton District Office)

**OPINION AND DECISION
AFTER RECONSIDERATION**

13 The Appeals Board previously granted reconsideration to further study the factual and legal issues
14 in this case. This is our Decision After Reconsideration.

15 In the Findings and Order of March 5, 2014, the workers' compensation administrative law judge
16 (WCJ) found, in relevant part, that applicant, while employed as a bus driver during the cumulative
17 trauma period ending November 16, 2012, claims to have sustained industrial injury to her hips, legs,
18 back and sleep, that defendant followed the proper procedure in requesting a Qualified Medical Evaluator
19 (QME) panel, and that "spine is an appropriate specialty to evaluate the alleged body parts."

20 Applicant filed a timely Petition for Reconsideration of the WCJ's decision, contending that
21 under *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc), defendant's
22 request for a panel QME list was untimely because it started one day too early. Applicant further
23 contended that the appropriate specialty to determine the issue of industrial injury is pain medicine,
24 because applicant's primary treating physician for the same body parts under a prior Stipulated Award in
25 a different case is a pain medicine specialist.

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1 Defendant filed an answer.

2 At the outset, we observe that because the WCJ's decision did not determine any substantive right
3 or liability, it was not a "final order, decision, or award" within the meaning of Labor Code sections 5900
4 and 5903. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases
5 650]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45
6 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82
7 Cal.App.3d 39 [43 Cal.Comp.Cases 661].)

8 In this case, applicant's Petition for Reconsideration should have been dismissed because removal
9 provides the appropriate remedy for a non-final order. (Lab. Code, § 5310; Cal. Code Regs., tit. 8, §
10 10843.) Accordingly, we will vacate our Opinion and Order Granting Petition for Reconsideration and
11 we will dismiss applicant's Petition for Reconsideration.

12 In reference to the merits, and treating applicant's petition for reconsideration as a petition for
13 removal, we have considered the allegations of applicant's petition and the contents of the report of the
14 WCJ with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's
15 report which we adopt and incorporate, we will deny removal.

16 We further note that the Findings and Order of March 5, 2014 is consistent with *Matute v. Los*
17 *Angeles Unified School Dist.* (2015) 80 Cal.Comp.Cases 1036 (Appeals Board en banc) as to the
18 timeliness of defendant's panel request to the Medical Unit of the DWC.

19 In addition, we note that removal is an extraordinary remedy rarely exercised by the Appeals
20 Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71
21 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th
22 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the
23 petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal.
24 Code Regs., tit. 8, § 10843(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must
25 demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the
26 petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).) Here, for the reasons stated in the
27 WCJ's report, we are not persuaded that substantial prejudice or irreparable harm will result if removal is

1 denied or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final
2 decision adverse to applicant.

3 With respect to the dissent, we acknowledge that applicant's Application for Adjudication of
4 Claim in this case (ADJ8677937) claims she sustained a "back" injury. Therefore, defense counsel's
5 March 11, 2013 request to DWC's Medical Unit was correct in stating that "the current claimed injury
6 involves the lumbar spine, so an evaluator with a spine specialty appears appropriate." Furthermore,
7 defense counsel was forthright in acknowledging that applicant's primary treating physician had a
8 different specialty than "spine." (This apparently referred to the treating physician in the other, admitted
9 back injury case of ADJ1343698.)

10 With regard to defense counsel's statement that "an orthopedic evaluator would be able to
11 determine potential need for surgery[,]" we believe that statement is reasonable in view of the particular
12 factual circumstances here. Applicant had a prior low back injury and claims an additional back injury.
13 Thus, she may have a potential need for surgery and an orthopedic evaluator would be best suited to
14 provide guidance on such possible need. This is not unusual in workers' compensation cases, and it
15 appears that both defense counsel and applicant's attorney are experienced practitioners. In fact, when
16 applicant's attorney submitted an objection to DWC's Medical Unit on March 13, 2013, she did not
17 contest defense counsel's statement to the Medical Unit that "an orthopedic evaluator would be able to
18 determine *potential* need for surgery," she only argued that the specialty of the primary treating physician
19 should be used. The Medical Unit found that argument unpersuasive.

20 Finally, in reference to regulation 31.1(b), we note that the QME regulations were amended
21 subsequent to the events in question here, and that the version of regulation 31.1(b) relied upon by
22 applicant refers to "the specialty of the treating physician." Ordinarily a primary treating physician is
23 recognized when an industrial injury has been accepted by the employer. Thus it appears the regulation
24 applies in accepted injury cases. This is a denied injury case.

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1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board, that the Opinion and Order Granting Petition for Reconsideration of May 27, 2014 is
4 **VACATED**, and that applicant's Petition for Reconsideration of the Findings and Order of March 5,
5 2014 is **DISMISSED**.

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1 Dear DWC Medical Unit:

2 The undersigned represents Merced City School District in the above case.
3 Enclosed please find the Request for Panel QME, along with a copy of the
4 letter to injured worker's attorney dated 2-22-13.

5 As of today's date, the parties do not have an AME in this case.

6 *The specialty of the treating physician, Dr. Kale Wedemeyer, is Physical
7 Medicine and Rehabilitation.* The current claimed injury involves the
8 lumbar spine, so an evaluator with a spine specialty appears appropriate.
9 An orthopedic evaluator would be able to determine *potential need for
10 surgery* better than would a doctor with her treating physician's specialty.

11 I am unaware of the specialty requested by the non-filing party.

12 (Trial exhibit A, italics added.)

13 In 2013, when defendant's request was made, QME regulation 31.1(b) stated:

14 "In the event a party in a represented case wishes to request a QME panel pursuant to Labor Code
15 section 4062.2 in a specialty other than the specialty of the treating physician, the party shall submit *with
16 the panel request form any relevant documentation supporting the reason for requesting a different
17 specialty.*" (2013 Cal. Code Regs., tit. 8, § 31.1(b), italics added.)

18 Here, defense counsel's March 11, 2013 request to the Medical Unit acknowledged that Dr.
19 Wedemeyer is the treating physician and that her specialty is physical medicine and rehabilitation.
20 However, defense counsel indicated a "potential need for surgery" without furnishing any documentation
21 that surgery was a possibility or other evidence required by regulation 31.1(b) that made an orthopedic
22 evaluator more appropriate than the treating doctor's specialty. In fact, there is no such evidence in this
23 case. Defense counsel's request also overlooked that applicant claims injury to other body parts,
24 including sleep disorder, for which an orthopedic evaluator may not have the proper expertise. Thus it
25 appears that the Medical Unit's appointment of a panel of orthopedic specialists was erroneous and
26 therefore invalid. There simply is no foundation here for a panel specialty other than physical medicine
27 and rehabilitation.²

² A bare assertion of a "potential need for surgery" to obtain a panel of orthopedists instead of the primary treating physician's specialty would controvert the panel QME statutory process by diluting the preference for QMEs within the same specialty as the primary treating physician, any time a physical injury is being treated by a non-surgeon.

1 For these reasons, I would grant removal and amend the WCJ's decision to order the Medical
2 Unit of the DWC to appoint a panel of QMEs in the specialty of physical medicine and rehabilitation.



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MARGUERITE SWEENEY, *Commissioner*

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DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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NOV 05 2015

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

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**SHARON ADAMS
LAW OFFICES OF T. MAE YOSHIDA
ANDERSSON & CONVERSE**

SVH/ara

SHARON ADAMS

MERCED CITY SCHOOL DISTRICT,
p.s.i.

WORKERS' COMPENSATION
JUDGE

TERRE A. SADOSKY

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

1. Dates of Injury: CT - 11/16/12
2. Identity of Petitioner: Applicant filed the Petition.
Timeliness: The Petition was timely filed.
Verification: The Petition is properly verified.
3. Date of Findings & Order: March 5, 2014
4. Petitioners Contentions: Applicant contends that the WCJ was incorrect in finding that Defendant followed the proper panel procedures and that an orthopedic panel was an appropriate specialist.

**II
FACTS**

Applicant filed a claim for a cumulative injury to November 16, 2012 to the hips, legs, back and sleep. This claim was denied by Defendant. It appears that Defendant offered AMEs by letter, dated February 22, 2013. On March 11, 2013, Defendant requested a panel in spine. Applicant objected to the request for a spine panel on March 13, 2013 and requested a panel in pain management. The medical unit issued a panel in orthopedic spine specialty on September 16, 2013. (panel #1538292) Applicant filed another objection to the issuance of a panel in the specialty of spine on September

19, 2013 and on September 21, 2013 the Medical Unit denied Applicant's request for a panel QME.

The matter came to Expedited Hearing on December 11, 2013. The parties were provided until January 21, 2014 to file Points & Authorities on which date the matter was submitted for decision. Points and Authorities were received from Defendant and Applicant on January 21, 2014 and February 21, 2014, respectively. A Findings & Order issued on March 5, 2014 and was served on March 6, 2014.

Applicant filed a timely and properly verified Petition for Reconsideration on March 25, 2014. At the time of this Report and Recommendation to the Petition for Reconsideration, no Answer to the Petition for Reconsideration had been filed.

III

DISCUSSION

Labor Code §5900(a) states, "Any person aggrieved directly or indirectly by any *final* order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in this division, may petition the appeals board for reconsideration...." (Emphasis added)

The Finding & Order for a panel is a discovery order. It is not a final order. Therefore, the filing of a Petition for Reconsideration by Applicant is not appropriate and should be dismissed.

Even if this could be considered a Petition for Reconsideration or alternatively a Petition for Removal it should be denied based on the following:

Labor Code §4060 states, in pertinent part,

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

Labor Code §4062.2 states, in pertinent part,

“(b) No earlier than the *first working day* that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060..., either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation....” (*Emphasis Added*)

In this case, Defendant sent Applicant a letter, dated February 22, 2013 offering AMEs to address issues including causation which meets the requirements of Labor Code §4062.2(b) as set out above. (See Defendant’s Exhibit C) Fifteen days after the request (allowing for 5 days for mailing) was March 9, 2013 which fell on a Sunday. The next working day (and first working day after the 15 required days) was Monday, March 11, 2013. This would be the first day that the parties could request a panel. Defendant made its request for a panel on March 11, 2013. Defendant’s request was proper.

Defendant requested a panel on March 11, 2013 and included in their request a letter to the medical unit identifying the treating doctor and explaining their basis for their request for the specialty in spine. Applicant requested a panel in pain management indicating that the treating physician on March 12, 2013 indicating that Dr. Wedemeyer was a pain medicine specialist. Attached to that correspondence is an internet printout indicating that Dr. Wedemeyer’s certification is in physical medicine and rehabilitation with a subspecialty of pain management. (See Applicant’s Exhibit 2)

Reg. § 31.1(b) states,

“In the event a party in a represented case wishes to request a QME panel pursuant to Labor Code section 4062.2 in a specialty other than the specialty of the treating physician, the party shall submit with the panel request form any relevant documentation supporting the reasoning for requesting a different specialty”

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Defendant attached correspondence setting out their basis for requesting a specialty different than the treater. It appears that the Medical Unit found that this information was sufficient to meet this provision and thus issued the panel in spine. Applicant argues that the panel should be in pain management. However, it appears from the information that was provided the primary specialty of the Dr. Wedemeyer is physical medicine and rehabilitation, not pain management.

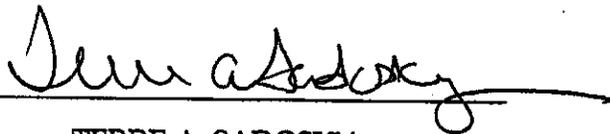
Based on the above the evidence supports that Defendant properly requested a panel QME in this matter and met the requirements of Reg. §31.1(b).

IV

RECOMMENDATION

It is respectfully recommended that Applicant's Petition for Reconsideration be denied.

Respectfully submitted,



TERRE A. SADOSKY
Workers' Compensation Judge