

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

3
4 **YESENIA GUILLEN,**

5 *Applicant,*

6 **vs.**

7 **ADIR INTERNATIONAL, LLC dba LA**
8 **CURACAO; TRAVELERS INSURANCE**
9 **COMPANY,**

10 *Defendants.*

Case No. **ADJ6896705**
 (Los Angeles District Office)

OPINION AND ORDER
 DISMISSING PETITION FOR
 RECONSIDERATION, GRANTING
 PETITION FOR REMOVAL, AND DECISION
 AFTER REMOVAL

11
12 Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ)
13 Findings and Order of April 12, 2012, wherein the WCJ found that "The applicant violated [Labor Code
14 section] 4062.2(c) by striking a name from the panel [qualified medical evaluator (QME)] list
15 prematurely," and that the parties were thus ordered to "proceed with Dr. Charles Schwarz as the panel
16 QME." In this matter, applicant claims that while employed as a sales associate during a cumulative
17 period from September 15, 2005 to June 30, 2009, she sustained industrial injury to her back, nervous
18 system and psyche.

19 A QME panel in the specialty of orthopedics was issued by the Division of Workers'
20 Compensation on August 9, 2011, and included Vincent L. Gumbs, M.D., Charles Schwarz, M.D. and F.
21 Daniel Kharrazi, M.D. On August 15, 2011, applicant's counsel crossed out Dr. Schwarz's entry, and
22 faxed the strike-out to the defense counsel. On August 17, 2001, defense counsel wrote a letter to the
23 applicant proposing Dr. Schwarz as an agreed panel medical evaluator. The August 17, 2011 letter made
24 no reference to the applicant's August 15, 2011 strike of Dr. Schwarz. On August 22, 2011, defense
25 counsel wrote to applicant's counsel, informing him that the defendant was striking Dr. Gumbs. Again
26 making no reference to the applicant's August 15, 2011 strike of Dr. Schwarz, defense counsel requested
27 that applicant "make a timely strike and pursuant to Labor Code section 4062.2(d) [and] arrange an

1 appointment for the applicant to be examined. If you fail to make a timely strike, then defendants will
2 select an evaluating physician.”

3 Applicant apparently failed to respond to the defendant’s correspondence, so the defendant
4 scheduled an evaluation with Dr. Schwarz for November 8, 2011. Applicant failed to attend the
5 evaluation. Both the applicant and defendant sought WCAB resolution of the issue, and the WCJ
6 eventually issued the decision under review.

7 Applicant contends that the WCJ erred in finding that applicant’s August 15, 2011 strike was a
8 nullity.¹ We have not received an answer, and the WCJ has filed a Report and Recommendation on
9 Petition for Reconsideration.

10 As explained below, we will dismiss the applicant’s petition for reconsideration because it is
11 taken from a non-final order, not subject to reconsideration.

12 Labor Code section 5900(a) allows reconsideration only of a “*final* order, decision, or award.”
13 (Emphasis added.) (See also Lab. Code, §§ 5901-5903.) As the California Court of Appeal, Fifth
14 Appellate District explained:

15 “A ‘final order’ for purposes of section 5900 includes any order which
16 settles, for purposes of the compensation proceeding, an issue critical to
17 the claim for benefits, whether or not it resolves all the issues in the
18 proceeding or represents a decision on the right to benefits. [Citations.]

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20 “[I]nterim orders, which do not decide a threshold issue, such as
21 intermediate procedural or evidentiary decisions, are not ‘final’ for
22 purposes of section 5900. [Citations.]” (*Maranian v. Workers’ Comp.*
23 *Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases
24 650].)

25 An order pertaining to discovery, such as the one at issue here, is not a “final” order subject to a
26 petition for reconsideration. (See, e.g., *Elwood v. Workers’ Comp. Appeals Bd.* (2001) 66
27 Cal.Comp.Cases 272 [writ denied]; *Lompoc Unified School District v. Workers’ Comp. Appeals Bd.*
(*Furuto*) (1997) 62 Cal.Comp.Cases 694 [writ denied]; *Cal-Pac Construction v. Workers’ Comp.*

¹ Although not relevant to our decision, the applicant mistakenly argues in her petition that a WCJ may not consider a digest of a “writ denied” case. It is perfectly permissible to consider California Compensation Cases digest of a “writ denied” case, although the cases are only persuasive authority, and are not binding. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Board en banc].)

1 *Appeals Bd. (Morris)* (1995) 60 Cal.Comp.Cases 1016 [writ denied]; *Hansen v. Workers' Comp. Appeals*
2 *Bd.* (1988) 53 Cal.Comp.Cases 193 [writ denied]; *Jablonski v. Workers' Comp. Appeals Bd.* (1987) 52
3 Cal.Comp.Cases 399 [writ denied]; *Beck v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 190
4 [writ denied].) We will therefore dismiss the applicant's petition.

5 However, treating the applicant's petition as one for removal pursuant to Labor Code section
6 5310, we will remove the case to ourselves, rescind the Findings and Order of April 12, 2012, and issue a
7 new decision ordering the applicant to be evaluated by panel QME F. Daniel Kharrazi, M.D.

8 Labor Code section 4062.2(c) states:

9 "Within 10 days of assignment of the panel by the administrative
10 director, the parties shall confer and attempt to agree upon an agreed
11 medical evaluator selected from the panel. If the parties have not agreed
12 on a medical evaluator from the panel by the 10th day after assignment of
13 the panel, each party may then strike one name from the panel. The
14 remaining qualified medical evaluator shall serve as the medical
15 evaluator. If a party fails to exercise the right to strike a name from the
16 panel within three working days of gaining the right to do so, the other
party may select any physician who remains on the panel to serve as the
medical evaluator. The administrative director may prescribe the form,
the manner, or both, by which the parties shall conduct the selection
process."

17 Although the defendant and the WCJ are correct that section 4062.2(c) envisions that the parties
18 will use the ten-day period after the assignment of a panel to meaningfully confer on an agreed medical
19 evaluator, we find that if a party strikes a name during the 10-day period, that strike is not automatically
20 rendered a nullity pursuant to Labor Code section 4062.2(c). However, if a party strikes a name from the
21 panel during the 10-day period, the responding party has the remainder of the 10 days plus 3 working
22 days to strike. The responding party in such a circumstance must communicate that strike to the initial
23 striking party on or before the 13th day after the assignment, without using the additional 10 days
24 outlined in section 4062.2(d) to simultaneously issue notice of the PQME appointment and the strike
25 implied by the making of the appointment. This will prevent the initial striking party from believing that
26 the responding party has not timely stricken a name so as to allow it to select a physician.

27 While the better practice is clearly to meaningfully confer within the 10-day period, and, if

1 applicable, to clearly communicate that none of the physicians are acceptable as an agreed medical
2 evaluator, nothing in section 4062.2(c) states that a strike made within the 10-day period is a nullity.
3 Although the applicant requests a new panel in her petition for reconsideration, section 4062.2(c) makes
4 clear that after each party has exercised a strike, "The remaining qualified medical evaluator shall serve
5 as the medical evaluator." Therefore, we will issue an order that applicant be evaluated by F. Daniel
6 Kharrazi, M.D.

7 For the foregoing reasons,

8 **IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings and Order of
9 April 12, 2012 is hereby **DISMISSED**.

10 **IT IS FURTHER ORDERED** that Applicant's Petition for Removal is hereby **GRANTED**, and
11 that this matter is **REMOVED** to the Appeals Board.

12 **IT IS FURTHER ORDERED** as the Decision after Removal of the Workers' Compensation
13 Appeals Board that the Findings and Order of April 12, 2012 is hereby **RESCINDED** and that the
14 following is **SUBSTITUTED** therefor:

15 **"FINDINGS OF FACT**

- 16 1. The applicant's August 15, 2011 strike was not rendered a nullity
17 because it was made within 10 days of the assignment of the
qualified medical evaluator panel.

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ORDER

IT IS ORDERED that the parties are to proceed with F. Daniel Kharrazi,
M.D. as the panel qualified medical evaluator."

WORKERS' COMPENSATION APPEALS BOARD



ALFONSO J. MORESI

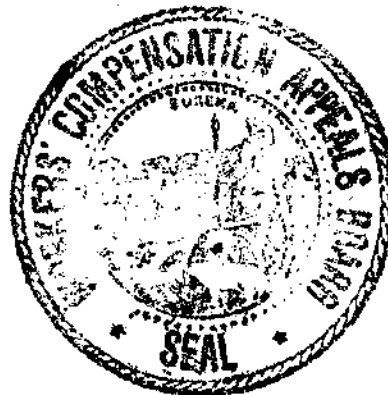
I CONCUR,



MARGUERITE SWEENEY

CONCURRING, BUT NOT SIGNING

FRANK M. BRASS



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 05 2012

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

YESENIA GUILLEN
BARRY W. RIEDEL
SALAH & LOZANO

DW/ebe

