

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

3
4 **DAVID MURRAY,**

5 *Applicant,*

6 *vs.*

7 **COUNTY OF MONTEREY, Permissibly**
8 **Self-Insured, Administered By INTERCARE**
9 **HOLDINGS INSURANCE SERVICES, INC.,**

10 *Defendants.*

Case No. ADJ9541181
(Salinas District Office)

OPINION AND ORDER
GRANTING PETITION FOR
REMOVAL AND DECISION
AFTER REMOVAL

11
12 By timely and verified petition, County of Monterey (defendant) seeks removal of the
13 December 9, 2014 Findings and Order (F&O) issued by a workers' compensation administrative law
14 judge (WCJ) in which it was found, in relevant part, that defendant's Qualified Medical Evaluator
15 (QME) panel request was untimely and, therefore, the appropriate QME panel specialty is Physical
16 Medicine and Rehabilitation.

17 Defendant contends that it will be substantially prejudiced and suffer irreparable harm which
18 cannot be remedied by reconsideration if the WCJ's F&O is permitted to stand because a QME in a
19 specialty other than the specialty requested by defendant will evaluate applicant and determine
20 compensability. Defendant also argues that its due process rights under the Labor Code will be violated
21 unless removal is granted.

22 The WCJ filed a Report and Recommendation on Petition for Removal (Report), recommending
23 that the Petition for Removal (Petition) be denied. We have received an answer to the Petition from
24 applicant. We have considered the allegations of the Petition, applicant's Answer, and the WCJ's Report
25 with respect thereto. Based upon our review of the record, and for the reasons set forth below, we will
26 grant removal and amend the F&O to find that defendant's QME panel request was timely and the
27 appropriate QME panel specialty is orthopedic surgery.

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1. Statement of Facts

Applicant, born [redacted], while employed as a sheriff sergeant on September 19, 2008, claims to have sustained an injury arising out of and occurring in the course of his employment to his neck, ankle and arm. The claim of injury has been denied by defendant.

On November 3, 2014, defendant filed a Declaration of Readiness to Proceed to Expedited Hearing (DOR) on the disputed issue of the appropriate QME panel specialty.

An expedited hearing was held on December 1, 2014. The Minutes of Expedited Hearing (MOH) state that the only issue is whether defendant's QME panel request is timely. If defendant's request is timely, the parties stipulate that the appropriate specialty is orthopedic surgery. If defendant's request is untimely, the parties stipulate that the appropriate specialty is physical medicine and rehabilitation, and that Lucy Lin, M.D. would be the Panel QME evaluator. (MOH, December 1, 2014, p. 2: 9-13.) The parties also agreed to the following chronology of events relative to the dispute:

1. On August 1, 2014, the claim denial was sent to applicant by defendant's adjusting agent.

2. On August 18, 2014, defendant requested a QME panel in the specialty of orthopedic surgery. (MOH, December 1, 2014, p. 2:15-19.)

On December 9, 2014, the WCJ issued the F&O, finding defendant's QME panel request untimely and, therefore, the appropriate QME panel specialty to be physical medicine and rehabilitation.

II. Discussion

At the outset we acknowledge that 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*.) The petitioner also must

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1 demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the
2 petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).)

3 A. The Statute

4 Labor Code section 4062.2¹, as amended by Senate Bill 863 (Statutes of 2012, ch. 363 § 29)
5 provides, in pertinent part:

6 (a) Whenever a comprehensive medical evaluation is required to
7 resolve any dispute arising out of an injury or a claimed injury occurring
8 on or after January 1, 2005, and the employee is represented by an
9 attorney, the evaluation shall be obtained only as provided in this section.

10 (b) No earlier than the first working day that is at least 10 days after
11 the date of mailing of a request for a medical evaluation pursuant to
12 Section 4060 or the first working day that is 10 days after the date of
13 mailing of an objection pursuant to Sections 4061 or 4062, either party
14 may request the assignment of a three-member panel of qualified medical
15 evaluators to conduct a comprehensive medical evaluation. The party
16 submitting the request shall designate the specialty of the medical
17 evaluator.

18 The method for computing the time frame in section 4062.2 is set forth in Code of Civil
19 Procedure section 12, Civil Code section 10, and Government Code section 6800, and California Code of
20 Regulations, title 8, section 10508 as follows: "The time in which any act provided by law is to be done
21 is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it
22 is also excluded." In accordance with these sections, when the day to request a panel falls on a weekend
23 or holiday, then the next business day would be the day to timely request a QME panel. Where mail is
24 used to serve the panel request, as it was in this case, "[t]he period of time for exercising or performing
25 any right or duty to act or respond shall be extended by (1) five calendar days from the date of service, if
26 the physical address of the party, lien claimant, attorney, or other agent being served is within
27 California." (Cal. Code Regs., tit. 8, § 10507(a)(1).)

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¹ All statutory references hereinafter are to the Labor Code unless otherwise specified.

1 In this case, defendant mailed the claim denial letter to applicant on August 1, 2014. The 15th day
2 after the denial (10 days plus five for mailing) was August 16, 2014, a Saturday. Because the 15th day
3 fell on a Saturday, that day is excluded and the next business day on which defendant could send its
4 QME panel request was Monday, August 18, 2014. Defendant made its QME panel request on August
5 18, 2014, making the request a timely request.

6 We recognize that the WCJ reached a contrary conclusion in reliance on our decision in *Messelle*
7 *v. Pitco Food, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Bd., en banc). That decision, however,
8 involved an earlier version of section 4062.2 that was substantially altered by amendment as part of
9 Senate Bill 863. (Statutes of 2012, ch. 363 § 29.) The earlier version of section 4062.2 provided, in
10 relevant part:

11 If either party requests a medical evaluation pursuant to Section 4060,
12 4061, or 4062, either party may commence the selection process for an
13 agreed medical evaluator by making a written request naming at least one
14 proposed physician to be the evaluator. The parties shall seek agreement
15 with the other party on the physician, who need not be a qualified medical
16 evaluator, to prepare a report resolving the disputed issue. If no agreement
17 is reached within 10 days of the first written proposal that names a
18 proposed agreed medical evaluator, or any additional time not to exceed
19 20 days agreed to by the parties, either party may request the assignment
20 of a three-member panel of qualified medical evaluators to conduct a
21 comprehensive medical evaluation.

18 *Messelle* applied the general rules for computation of statutory time periods² and held that the
19 10-day time period for agreeing on an AME excludes the first day, the date of the first written proposal,
20 and includes the last day, the 10th day to reach agreement on an AME. Thus, the earliest date to request a
21 QME panel is the 11th day. Where the first written AME proposal is served by mail, the 10-day time
22 period is extended by five days and the QME panel request can only be made after the 15th day, i.e., on
23 the 16th day or later. (*Messelle, supra*, at pp. 967-968.)

24 Existing section 4062.2, which is the version applicable to this case, no longer requires the parties
25 to seek agreement on an AME. The legislature deleted that provision in Senate Bill 863. Now the party
26 desiring a QME panel may request one, “[n]o earlier than the first working day that is at least 10 days

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² Cal. Code Civ. Pro., § 12; Civ. Code, § 10; and Gov. Code, § 6800.

1 after the mailing” of a request for evaluation under section 4060 or an objection to the treating
2 physician’s opinions under section 4061 or 4062. Thus, section 4062.2 now allows a request for a QME
3 panel to be made on the 10th day after a written objection (or, on the 15th day, if the request is mailed).
4 Here, defendant mailed its denial to applicant on August 1, 2014. The 15th day was Saturday,
5 August 16th. The next business day upon which defendant could request a QME panel was Monday,
6 August 18, 2014. The rationale in *Messelle, supra*, is not applicable to section 4062.2 in its current
7 version. Because defendant requested a QME panel on Monday, August 18, 2014, which was the next
8 business day after the 15th day, defendant’s request was timely. Therefore, we will grant the Petition,
9 and amend the F&O to find defendant’s QME panel request timely and to find the appropriate specialty
10 is orthopedic surgery. We will also delete Finding of Fact No. 5, since the appropriate QME panel is
11 orthopedic surgery and not physical medicine and rehabilitation. Finally, we will amend the Order
12 consistent with the amended Findings of Fact.

13 For the foregoing reasons,

14 **IT IS ORDERED** that defendant’s Petition for Removal of the Findings and Order issued in this
15 case on December 9, 2014 is **GRANTED**, and as our Decision After Removal, the Findings and Order
16 are **AMENDED** as follows:

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18 **FINDINGS OF FACT**

- 19 1. Applicant, David Murray, L., while employed on
20 September 19, 2008, at Salinas, California by County of Monterey, as a
21 sheriff sergeant, claims to have sustained injury arising out of and
22 occurring in the course of employment to his neck, right arm, and right
23 ankle.
- 24 2. At the time of the injury the employer was permissibly self-
25 insured.
- 26 3. Defendant’s QME panel request was timely.
- 27 4. The appropriate QME panel specialty is orthopedic surgery.

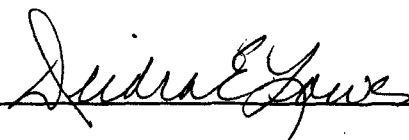
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1 **ORDER**

2 **IT IS ORDERED** that defendant's QME panel request was timely and that the appropriate QME
3 panel specialty is orthopedic surgery.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 DEIDRA E. LOWE

9 **I CONCUR,**

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11 **KATHERINE ZALEWSKI**

12 **CONCURRING, BUT NOT SIGNING**

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15 **FRANK M. BRASS**

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

17 **MAY 29 2015**

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

20 **DAVID MURRAY**
21 **HEGGENESS, SWEET, SIMINGTON & PATRICO, A.P.C.**
22 **SPRENKLE & GEORGIAROU**



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27 **SVH/ec**