

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4
5 **JANELLE BOGUE,**

6 *Applicant,*

7 **vs.**

8
9 **COUNTY OF SOLANO; Permissibly Self-
10 Insured, Adjusted by ATHENS
ADMINISTRATORS,**

11 *Defendants.*

**Case Nos. ADJ10913370; ADJ10913378
(Sacramento District Office)**

**OPINION AND ORDER
DENYING PETITION FOR
REMOVAL**

12
13 Applicant seeks removal in response to the Joint Findings and Order (Findings) issued by the
14 workers' compensation administrative law judge (WCJ) on April 17, 2018, by which the WCJ found that
15 Daniel D'Amico, M.D., should continue to act as the panel qualified medical evaluator (PQME).

16 Defendant filed an answer (Answer) requesting we deny removal. The WCJ filed a Report and
17 Recommendation on Petition for Removal (Report) recommending that we deny removal.

18 We have considered the allegations of applicant's Petition for Removal, defendant's Answer, and
19 the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the
20 reasons discussed below, we will deny removal.

21 **I.**

22 **FACTUAL BACKGROUND**

23 Applicant claims an injury to her back, neck, shoulders, chest, knee and right ankle on May 24,
24 2017 while employed as an accounting tech for the County of Solano (ADJ10913370). Applicant also
25 claims injury to her neck, shoulders, chest, knee and hips through June 20, 2017 while employed in the
26 same position (ADJ10913378).

27 *///*

1 On November 3, 2017, the Medical Unit issued a QME Panel in response to defendant's request.
2 (Defendant's Exhibit A, Panel 2148307, November 3, 2017.) On November 13, 2017, defendant
3 exercised its strike and on November 20, 2017, applicant exercised her strike from the panel.
4 (Defendant's Exhibit C, Letter from Defense Counsel, November 13, 2017 and Defendant's Exhibit B,
5 Letter from Applicant's Counsel, November 20, 2017.) Dr. D'Amico was the last remaining physician
6 after both parties' respective strikes.

7 Applicant avers that her attorney called Dr. D'Amico's office on November 20, 2017¹, and as the
8 doctor was scheduling beyond 60 days, directed his assistant to request a replacement panel.
9 (Applicant's Exhibit 3, Declaration of Andy Szeto, April 2, 2018.)

10 On December 13, 2017, defendant sent a letter to applicant advising her that she was scheduled to
11 be evaluated by Dr. D'Amico on February 12, 2018. (Defendant's Exhibit D, Letter from Defense
12 Counsel, December 13, 2017.) Applicant and defendant both sent letters to the PQME describing the
13 issues to be addressed at the evaluation. (Defendant's Exhibit F, Letter from Applicant's Counsel,
14 January 5, 2018; Defendant's Exhibit H, Letter from Defense Counsel, January 22, 2018; MOH, April 3,
15 2018, p. 5.) Applicant attended the February 12, 2018 PQME evaluation as scheduled. (MOH, April 3,
16 2018, p. 3.)

17 On February 13, 2018, applicant sent a letter to Dr. D'Amico asking him not to issue a report as
18 there was a dispute as to whether he was the correct PQME. (Applicant's Exhibit 2, Letter from
19 Applicant's Counsel to PQME, 2/13/18.) On March 2, 2018, defendant filed a Declaration of Readiness
20 to Proceed to an expedited hearing on the issue of applicant's allegation that Dr. D'Amico should not
21 serve as the PQME. On March 15, 2018, applicant objected to the Declaration of Readiness to Proceed
22 alleging that she had requested a replacement QME panel.

23 At the expedited hearing, applicant contended that a replacement panel is appropriate as she
24 requested one on December 18, 2017; applicant acknowledges that neither defendant nor the Medical
25 Unit apparently received the request. (MOH, April 3, 2018, pp. 3, 4.) Defendant contended that Labor
26

27

¹ The Minutes of Hearing for the April 3, 2018 expedited hearing indicate that he called the doctor on November 30, 2017.

1 Code § 4062.2² authorized it to schedule the PQME and that Rule 31.3(e) (Cal. Code Regs., tit. 8,
2 § 31.3(e)) allows the party with the right to schedule a PQME appointment to waive the requirement that
3 a PQME be scheduled in 60 days. (*Id.* at p. 3.) On April 17, 2018, the WCJ issued the Findings wherein
4 he determined that Dr. D'Amico was duly selected to serve as the PQME and that nothing in the record
5 supports a determination that he should not continue to do so. (Findings, April 17, 2018). Applicant
6 seeks removal as discussed above.

7 II.

8 DISCUSSION

9 Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers'*
10 *Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5];
11 *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases
12 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial
13 prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a);
14 see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration
15 will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code
16 Regs., tit. 8, § 10843(a).)

17 The Labor Code provides that: "the represented employee shall be responsible for arranging the
18 appointment for the examination, but upon his or her failure to inform the employer of the appointment
19 within 10 days after the medical evaluator has been selected, the employer may arrange the appointment
20 and notify the employee of the arrangements." (Lab. Code, § 4062.2(d).)

21 Applicant had the initial right to arrange an appointment for an evaluation with the PQME per
22 section 4062.2(d). As she failed to inform defendant that she could not obtain an appointment within 10
23 days of Dr. D'Amico's selection, under the circumstances here, the right to schedule the appointment
24 switched to defendant. The WCJ thus correctly concluded that he should remain as the PQME.

25 Applicant has failed to demonstrate that the Findings will result in significant prejudice against
26 her or that she will suffer irreparable harm if removal is not granted. Applicant retains the ability to
27

² All future statutory references are to the Labor Code unless otherwise specified.

1 conduct discovery, including, but not limited to, soliciting a report from her primary treating physician or
2 deposing Dr. D'Amico if she wishes to challenge his findings. Applicant has further failed to
3 demonstrate that reconsideration will not be an adequate remedy if Dr. D'Amico is permitted to continue
4 serving as the PQME. Therefore, we will deny applicant's Petition for Removal of the April 17, 2018

5 Joint Findings and Order.

6 / / /

7 / / /

8 / / /

9 / / /

10 / / /

11 / / /

12 / / /

13 / / /

14 / / /

15 / / /

16 / / /

17 / / /

18 / / /

19 / / /

20 / / /

21 / / /

22 / / /

23 / / /

24 / / /

25 / / /

26 / / /

27 / / /

1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's Petition for Removal is **DENIED**.

3
4 **WORKERS' COMPENSATION APPEALS BOARD**

5
6 
7 _____
8 **JOSÉ H. RAZO**

9 **I CONCUR,**

10
11  **CHAIR**
12 _____
13 **KATHERINE ZALEWSKI**

14 
15 _____
16 **MARGUERITE SWEENEY**



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

18 **AUG 06 2018**

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

22 **JANELLE BOGUE**
23 **LENAHAN, LEE, SLATER & PEARSE**
24 **SHATFORD LAW**

25
26 **AH/ara**