WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TYREE FOSTER, ***Applicant,*** **vs.** **EXPRESS EMPLOYMENT PROFESSIONALS; SEDGWICK CLAIMS MANAGEMENT SERVICES,** ***Defendants.***	**Case No. ADJ10777586** **(San Francisco District Office)** **OPINION AND 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 based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will deny removal.

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.*) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).) Here, based upon the WCJ's analysis of the merits of petitioner's arguments, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

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For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

CHAIR

KATHERINE ZALEWSKI

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
MAR 13 2018

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

DANIEL HEGWER
LLARENA MURDOCK LOPEZ & MOTSCHENBACHER, APC
TYREE FOSTER

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STATE OF CALIFORNIA

WORKERS' COMPENSATION APPEALS BOARD

TYREE FOSTER, *Applicant,* v. **EXPRESS EMPLOYMENT PROFESSIONALS, insured by INS. CO. OF THE STATE OF PENNSYLVANIA,** *Defendants.*	Case No. ADJ10777586 **Report and Recommendation on Petition for Removal**

INTRODUCTION

Defendants seek removal of this matter in connection with my orders, made during the December 7, 2017, Mandatory Settlement Conference ("MSC") herein, whereby I directed applicant to be examined by a regular physician for purposes of resolving medical-legal disputes between the parties and appointed Joel Renbaum, M.D., as that physician. Defendants contend that, if my orders are allowed to stand, they will suffer significant prejudice and irreparable harm by being deprived of the Panel Qualified Medical Evaluation ("QME") process prescribed in Labor Code §§ 4060, *et seq*.[1] The petition is timely and verified. To date, I am not aware of an answer having been filed.

FACTS

1. *Procedural background.*

Applicant claims to have injured his back on November 29, 2016, while working for the defendant employer. His claim has been denied. The sole Application for Adjudication in this matter was filed on March 6, 2017 (EAMS Document ID No. 63027839). On November 2, 2017, applicant filed a Declaration of Readiness to Proceed, requesting a Mandatory Settlement

[1] All subsequent statutory references are to the Labor Code.

Conference regarding a "panel dispute" and indicating that the parties were in need of a third replacement panel of QMEs. Defendants filed a timely objection, averring that a hearing would be moot or premature because the Division of Workers' Compensation Medical Unit had recently issued a new replacement panel list. An MSC was set, pursuant to applicant's Declaration, in my department, for December 7, 2017.

2. *Proceedings at the December 7, 2017, MSC.*

During the hearing, following an initial discussion with the parties, a formal, recorded conference took place (see Minutes of Conference and Orders, EAMS Document ID No. 65636313). The parties agreed on the following timeline:

- applicant made the initial QME panel request on April 11, 2017;
- after the remaining QME from the original panel (Dr. Shen) turned out to be unavailable, the parties submitted a replacement panel request on May 22, 2017;
- the remaining doctor from the first replacement panel (Dr. Henry) was scheduling in 2018, so the parties sought another replacement panel;
- from the second replacement panel, the remaining QME was Dr. Grant, whose earliest available appointment was seven months out, so another replacement panel was requested;
- the remaining doctor from the third replacement panel (Dr. Cheng) was not available sooner than April 2018, leading the parties to submit yet another replacement panel request on November 21, 2017. As of the time of this MSC, that request was pending at the Medical Unit.

The parties also informed me that an Agreed Medical Evaluation was not acceptable to the defendants, regardless of the proposed physician. Applicant's counsel solicited my assistance in moving his client's case forward, representing that applicant had lost his job and was without

benefits "due to the difficulty of being unable to obtain a medical evaluation…." Indeed, no medical reports have been filed and none were offered to me by the parties at the MSC.

3. *Orders at the MSC.*

As reflected in the Minutes, I issued the following findings and orders after considering the arguments and evidence:

> I find that the record is not sufficiently developed to allow adjudication of AOE/COE at this point. I also find that the parties have been diligent in pursuing medical-legal discovery, but have been unsuccessful for reasons that are beyond their control. [¶] … [I]n the interest of expediting resolution of compensability in this case, as well as potentially other medical questions, pursuant to the authority of Labor Code Section 5701, I will direct applicant to be examined by Dr. Joel Renbaum for all medical-legal purposes in this case. The parties are ordered to communicate with Dr. Renbaum in the same manner as they would if he were appointed as a Qualified Medical Evaluator.

In addition, I informed the parties that, prior to going on the record, I confirmed with Dr. Renbaum's office that he was available for medical-legal appointments as early as January 2018 at his San Francisco location and March in Oakland. Thus, I found that an evaluation with Dr. Renbaum would likely be completed sooner than the parties could proceed with a QME from the presumably forthcoming fourth replacement QME panel, even assuming it produced a name the parties could actually use. With that, I ordered the matter off calendar.

4. *Contentions on removal.*

In their petition for removal, defendants assert that my order for applicant to be examined by Dr. Renbaum "for all medical-legal purposes" exceeds the lawful bounds of my discretion. They further contend that they have a right to go through the QME selection procedure pursuant

to § 4060 and that my orders have denied them that right.

DISCUSSION

1. *The order directing applicant to be examined by Dr. Renbaum as to AOE/COE is supported by good cause as well as § 5701.*

First, although it is not clear whether defendants are disputing my findings on this issue, I continue to believe that I acted within my authority when I appointed Dr. Renbaum as the "regular physician" within the meaning of § 5701 and directed applicant to be examined by him. As the record shows, even though applicant's alleged injury happened more than a year before the December 7 MSC, the claim remained denied—partly for lack of supporting medical evidence, according to the parties—with no prospects for allowing a trial judge to decide AOE/COE in the absence of medical reports. The record is plainly in need of development. See *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal. App. 4th 1117. Furthermore, I found that the parties had been diligent in their efforts with regard to the QME panel selection procedure; this is amply illustrated by the fact that they managed to submit five panel requests to the Medical Unit between April and November 2017. For reasons that are out of the parties' control (and beyond my comprehension), four panel lists have failed to yield a physician capable of offering a regulation-compliant appointment window.

The California Constitution requires me to administer the workers' compensation laws so as to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character…" (Cal. Const., Art. XIV § 4). Having identified an aspect of the case requiring further evidence, I endeavored to comply with my obligation to develop the record accordingly in a reasonably expeditious way. See *Kuykendall v. Workers' Comp. Appeals Bd.*

(2000) 65 Cal. Comp. Cases 254, 269. In doing so, I selected an examining physician with confirmed timely availability, whom I generally find credible, and whose candidacy was not put forth by either party[2]. In contrast, the parties' experience with the QME database gives me little confidence that their fourth replacement panel request would result in a viable QME, if and when such a panel were issued.

2. *The extension of Dr. Renbaum's role beyond AOE/COE is fair and logical.*

Defendants appear to contend, in their petition for removal, that my authority to appoint Dr. Renbaum for a medical examination extends only to what would otherwise be covered by a QME obtained pursuant to § 4060—i.e., compensability. There is no legal support for such a position and, in actuality, it would be illogical and costly. Assuming applicant's claim survives beyond the AOE/COE medical evaluation (meaning Dr. Renbaum and/or a trial judge finds the injury compensable), removing him from the case in favor of another physician would cause delays, requiring further proceedings and comprehensive examinations. For this reason, a QME selected pursuant to § 4060 continues to report on the case when the disputed issues extend beyond compensability. My intention here was to impose the same role on Dr. Renbaum and to obviate further litigation or panel requests, even if such issues are not yet present.

3. *There is no "right" to the QME procedure set forth in §§ 4060, et seq.*

Contrary to defendants' contention, the Labor Code does not grant them an unconditional right to participate in the panel QME selection protocol specified in §§ 4062.2, the statute to

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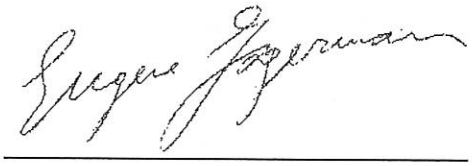
[2] In fact, the selection of Dr. Renbaum, an orthopedic surgeon, arguably could have been challenged by applicant, whose QME panel request to the Medical Unit must have specified either pain medicine or physical medicine and rehabilitation, judging by the doctors named by the parties during the hearing. In the absence of any evidence to the

which § 4060(c) points in cases of compensability disputes involving represented applicants. The statute limits litigants' options for obtaining medical-legal evidence, but it does not require or entitle them to select a QME. In fulfilling my obligation to develop the record regarding AOE/COE, I have ensured that a comprehensive medical evaluation will be completed. In effect, this renders § 4062.2 inapplicable because, on its face, it affects the parties' discovery "[w]henever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney…."

RECOMMENDATION

For the foregoing reasons, I recommend that defendants' Petition for Removal, filed herein on December 27, 2017, be denied.

DATED: January 10, 2018



Eugene Gogerman
Workers' Compensation Judge
Workers' Compensation Appeals Board

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

Date: January 10, 2018

By: A. Paraiso

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contrary, I continue to believe that Dr. Renbaum is well-equipped to evaluate applicant's alleged specific back injury.