

1 reasons discussed below, we will also deny defendant's Petition as one seeking reconsideration of the
2 F&O in ADJ11134833.

3 FACTUAL BACKGROUND

4 The facts are as stated in the WCJ's Report.

5 DISCUSSION

6 I.

7 Defendant filed its Petition seeking removal rather than reconsideration of the F&O. A petition
8 for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a),
9 5902, 5903.)¹ A "final" order has been defined as one that either "determines any substantive right or
10 liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway*
11 *Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45
12 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82
13 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the
14 claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075
15 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the
16 workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra*, 81
17 Cal.App.4th at p. 1075 ("interim orders, which do not decide a threshold issue, such as intermediate
18 procedural or evidentiary decisions, are not 'final' "); *Rymer, supra*, 211 Cal.App.3d at p. 1180 ("[t]he
19 term ['final'] does not include intermediate procedural orders or discovery orders"); *Kramer, supra*, 82
20 Cal.App.3d at p. 45 ("[t]he term ['final'] does not include intermediate procedural orders").) Such
21 interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial
22 setting, venue, or similar issues.

23 Here, the issues at trial in ADJ11134833 solely involved intermediate discovery disputes
24 regarding whether applicant's QME panel request in pain management was valid and whether it was
25 appropriate for the Medical Unit to issue a panel per applicant's request. However, since the F&O

26 _____
27 ¹ All further statutory references are to the Labor Code unless otherwise stated.

1 includes a finding of injury AOE/COE for the right shoulder (Finding of Fact No. 4) in ADJ11134833,
2 this is a final order on a threshold issue.

3 II.

4 Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals
5 Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, “it is a fundamental
6 principle of due process that a party may not be deprived of a substantial right without notice....”
7 (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In
8 *Shipley*, the Appeals Board denied applicant’s petition for reconsideration because the Appeals Board
9 had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals
10 Board did not act on applicant’s petition because it had misplaced the file, through no fault of the parties.
11 The Court of Appeal reversed the Appeals Board’s decision holding that the time to act on applicant’s
12 petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

13 Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies
14 should fall on [a party].” (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Defendant’s Petition was timely
15 filed on October 26, 2018. Our failure to act was due to a procedural error and our time to act on
16 defendant’s Petition was tolled.

17 III.

18 Although the F&O contains a finding that is final pursuant to the discussion above, defendant’s
19 Petition only challenges the orders that the parties proceed with the pain management panel in
20 ADJ11134833 and that the parties obtain a new internal medicine panel in ADJ11134852. These are
21 interlocutory orders regarding discovery disputes and are subject to the removal standard rather than
22 reconsideration. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5
23 Cal.App.5th 658 [81 Cal.Comp.Cases 1122] [Court of Appeal held that whether a communication with a
24 QME was ex parte is not a threshold issue subject to reconsideration].)

25 Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’*
26 *Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v.*
27 *Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133].) The

1 Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable
2 harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez, supra*;
3 *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate
4 remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, §
5 10843(a).)

6 Section 4062(a) states in full:

7 If either the employee or employer objects to a medical determination
8 made by the treating physician concerning any medical issues not covered
9 by Section 4060 or 4061 and not subject to Section 4610, the objecting
10 party shall notify the other party in writing of the objection within 20 days
11 of receipt of the report if the employee is represented by an attorney or
12 within 30 days of receipt of the report if the employee is not represented by
13 an attorney. These time limits may be extended for good cause or by
14 mutual agreement. If the employee is represented by an attorney, a
15 medical evaluation to determine the disputed medical issue shall be
16 obtained as provided in Section 4062.2, and no other medical evaluation
17 shall be obtained. If the employee is not represented by an attorney, the
18 employer shall immediately provide the employee with a form prescribed
19 by the medical director with which to request assignment of a panel of
20 three qualified medical evaluators, the evaluation shall be obtained as
21 provided in Section 4062.1, and no other medical evaluation shall be
22 obtained.

23 (Lab. Code, § 4062(a).)

24 Section 4062.1 provides the procedure for an unrepresented worker to obtain a QME panel. (Lab.
25 Code, § 4062.1.) Section 4062.1(e) specifies:

26 If an employee has received a comprehensive medical-legal evaluation
27 under this section, and he or she later becomes represented by an attorney,
he or she shall not be entitled to an additional evaluation.

(Lab. Code, § 4062.1(e).)

Alternatively, if the employee is represented by an attorney, section 4062.2 provides the procedure to
obtain a QME panel. (Lab. Code, § 4062.2.) Section 4062.2 states as follows, in relevant part:

(a) Whenever a comprehensive medical evaluation is required to resolve any
dispute arising out of an injury or a claimed injury occurring on or after

1 January 1, 2005, and the employee is represented by an attorney, the
2 evaluation shall be obtained only as provided in this section.

3 (b) No earlier than the first working day that is at least 10 days after the date of
4 mailing of a request for a medical evaluation pursuant to Section 4060 or
5 the first working day that is at least 10 days after the date of mailing of an
6 objection pursuant to Sections 4061 or 4062, either party may request the
7 assignment of a three-member panel of qualified medical evaluators to
8 conduct a comprehensive medical evaluation. The party submitting the
9 request shall designate the specialty of the medical evaluator, the specialty
10 of the medical evaluator requested by the other party if it has been made
11 known to the party submitting the request, and the specialty of the treating
12 physician. The party submitting the request form shall serve a copy of the
13 request form on the other party.

14 ...
15 (e) If an employee has received a comprehensive medical-legal evaluation
16 under this section, and he or she later ceases to be represented, he or she
17 shall not be entitled to an additional evaluation.

18 (Lab. Code, § 4062.2(a)-(b) and (e).)

19 In a significant panel decision, the Appeals Board analyzed the application of sections 4062.1 and
20 4062.2 when an employee is unrepresented when a QME panel issues, but then becomes represented
21 before receiving an evaluation by a physician from the panel. (*Romero v. Costco Wholesale* (2007) 72
22 Cal.Comp.Cases 824.)² In *Romero*, defendant requested a QME panel in orthopedic surgery after it
23 disputed medical treatment recommended by the employee's treating physician. (*Id.* at p. 826.) A QME
24 panel issued in response to defendant's request, but then the employee became represented by counsel
25 and changed treating physicians to a chiropractor. (*Id.*) An evaluation had been scheduled with a QME
26 from the orthopedic panel, but had not taken place yet. The employee requested a new QME panel of
27 chiropractors, but this request was denied by the Medical Unit. The WCJ ordered the Medical Unit to
issue the panel of chiropractors and the Appeals Board affirmed the WCJ. (*Id.* at p. 825.)

The *Romero* panel determined that "for purposes of sections 4062.1(e) and 4062.2(e), that an

² A significant panel decision is one that is identified for dissemination by the Appeals Board in order to address new or recurring issues of importance to the workers' compensation community. Significant panel decisions have been reviewed by each of the commissioners, who agree that the decision merits general dissemination.

1 employee has 'received' a comprehensive medical-legal evaluation when the employee attends and
2 participates in the medical evaluator's examination." (*Romero, supra*, 72 Cal.Comp.Cases at p. 825.)
3 Since Romero "had not attended and participated in an examination by the panel QME when she changed
4 from being not represented by an attorney to being represented, she had not 'received' a comprehensive
5 medical-legal evaluation pursuant to section 4062.1 and is, therefore, not precluded from requesting a
6 new QME panel pursuant to section 4062.2." (*Id.* at p. 828.)

7 In the instant matter, applicant also has not "received" a comprehensive medical-legal evaluation
8 from the first QME panel issued in orthopedic surgery. No evaluation has been conducted with a
9 physician from that panel. Section 4062.2 expressly provides that if "the employee is represented by an
10 attorney, the evaluation shall be obtained only as provided in this section." Pursuant to *Romero* and the
11 express language of section 4062.2, once applicant became represented he was obligated to obtain a
12 medical-legal evaluation in accordance with section 4062.2. He furthermore was entitled to obtain a new
13 QME panel since no evaluation had taken place with a physician from the first panel.

14 Defendant contends that a party cannot unilaterally change the panel specialty pursuant to
15 *Romero*. No legal authority for this contention is cited and the factual circumstances in this matter are
16 similar to what was deemed permissible in *Romero*. Applicant was entitled to request a new panel once
17 he became represented under *Romero*. Section 4062.2(b) expressly states that the "party submitting the
18 request shall designate the specialty of the medical evaluator." As the party submitting the QME panel
19 request, applicant had the right to designate the panel specialty.

20 Applicant's request for a panel in pain management was for a new panel under section 4062.2 and
21 not a replacement panel request. Thus, applicant was not obligated to comply with the regulations
22 governing replacement panel requests. (See Cal. Code Regs., tit. 8, §§ 31.1(b), 31.5(a)(10).)
23 Defendant's contentions about compliance with the regulations for replacement panel requests, the
24 WCJ's jurisdiction to address the appropriate panel specialty and the need to develop the record on which
25 specialty is medically appropriate are consequently not relevant.

26 **IV.**

27 Defendant contends that the F&O denied its right to due process because it did not have notice

1 that the issue of the appropriateness of the panel’s medical specialty would be addressed. All parties to a
2 workers’ compensation proceeding retain the fundamental right to due process and a fair hearing under
3 both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82
4 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) Due process requires, in relevant part, that a party
5 receive notice and an opportunity to be heard before an action adverse to its interest is taken. (*Beverly*
6 *Hills Multispecialty Group, Inc. v. Workers’ Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789
7 [59 Cal.Comp.Cases 461]; *Fortich v. Workers’ Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449 [56
8 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-
9 examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v.*
10 *Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker,*
11 *supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58
12 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57
13 Cal.Comp.Cases 230].)

14 The issues at trial in ADJ11134833 were framed as “[w]hether the applicant’s attorney made a
15 valid replacement panel QME request” and “[w]hether it was appropriate for the Medical Unit to issue a
16 pain management panel that was requested by the applicant’s attorney when a prior valid orthopedic
17 panel had issued.” (Minutes of Hearing and Summary of Evidence, September 20, 2018, p. 2.)
18 Defendant agreed that these were the issues to be adjudicated and was given an opportunity to present
19 evidence on these issues. Pursuant to the analysis above, it was appropriate for the Medical Unit to issue
20 a new panel in pain management in response to applicant’s request after he became represented.
21 Defendant was not denied due process by the F&O.

22 Defendant has also failed to show that it will suffer significant prejudice or irreparable harm from
23 the order that the parties proceed with an evaluation with the pain management panel in ADJ11134833.

24 Therefore, we will deny defendant’s Petition as one seeking reconsideration.

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1 For the foregoing reasons,

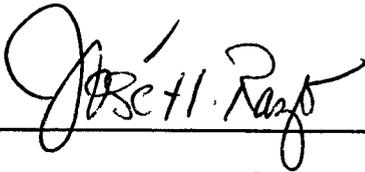
2 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings of Fact, Award,
3 Orders and Opinion on Decision issued by the WCJ on October 1, 2018 is **DENIED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

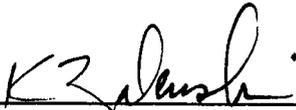
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7 **DEIDRA E. LOWE**

8 **I CONCUR,**

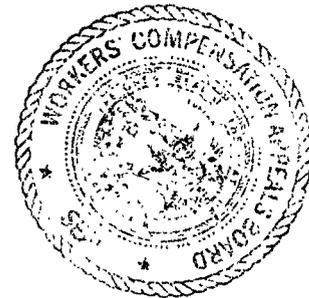
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12 **JOSÉ H. RAZO**

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15 **CHAIR**

16 **KATHERINE ZALEWSKI**



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

18
19 **APR 15 2019**

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

22 **PETER LUCKHARDT**
23 **RAINS, LUCIA, STERN, ST. PHALLE & SILVER, PC**
24 **STOCKWELL, HARRIS, WOOLVERTON & HELPHREY**

25 *AI/pc*

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