

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **ELISHA HARDEN,**

5 *Applicant,*

6 **vs.**

7 **COUNTY OF SACRAMENTO, permissibly**
8 **self-insured,**

9 *Defendant.*

Case No. ADJ9011624
(Oakland District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

10
11 We granted reconsideration in order to further study the factual and legal issues in this case. This
12 is our Opinion and Decision After Reconsideration.

13 Defendant sought removal in response to the Findings and Orders and Opinion on Decision
14 (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 20, 2019.¹ By
15 the F&O, the WCJ found that defendant may not provide certain medical records to the orthopedic
16 agreed medical evaluator (AME) or the psychiatric panel qualified medical evaluator (QME).

17 Defendant contends that the F&O improperly applies the applicable law and regulations to
18 provision of medical records to medical-legal evaluators. Defendant also contends that newly discovered
19 evidence mandates a replacement psychiatric QME panel.

20 We received an answer from applicant. The WCJ issued a Report and Recommendation on
21 Petition for Removal (Report) recommending that we deny removal.

22 We have considered the allegations of defendant's Petition for Removal, applicant's answer and
23 the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the
24 reasons discussed below, we will rescind the F&O, and issue a new decision finding that applicant
25 sustained injury AOE/COE (per the parties' stipulation) and that the medical reports in dispute may be
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¹ The F&O is dated August 19, 2019, but was not served until August 20, 2019.

1 provided to the orthopedic AME Dr. Mandell and the psychiatric QME. We will also order applicant's
2 objection to provision of these reports to the medical-legal evaluators overruled.

3 **FACTUAL BACKGROUND**

4 Applicant claims injury to the cervical spine, lumbar spine and psyche on November 14, 2012
5 while employed as a probation assistant by the County of Sacramento, which is permissibly self-insured.

6 The parties agreed to use Peter Mandell, M.D., as the orthopedic AME. Dr. Mandell has
7 evaluated applicant and issued reports addressing her industrial injury. (Defendant's Exhibit A, Reports
8 of Dr. Peter Mandell, January 30, 2014, March 29, 2014 and February 26, 2016.) Elizabeth Wantuch,
9 Psy.D., evaluated applicant as the psychiatric panel QME and also issued reports addressing her
10 industrial injury. (Defendant's Exhibit B, Reports of PQME Elizabeth Wantuch, Psy.D., July 17, 2015,
11 September 5, 2016, January 15, 2018 and March 9, 2018.)

12 Joseph McCoy, M.D., evaluated applicant in 2016 as an orthopedic independent medical
13 examiner (IME) in relation to her application for disability retirement. (Defendant's Exhibit E, Report of
14 IME Joseph McCoy, M.D., August 4, 2016.) His report was addressed to the Sacramento County
15 Employees Retirement System. (*Id.* at p. 1.) Dr. McCoy stated the purpose of his examination as
16 follows:

17 I have been asked to evaluate Elisha Harden as it relates to an application
18 for disability retirement from her prior occupation as a probation assistant
19 for the Sacramento County Department of Probation.

20 (*Id.*)

21 Richard Lieberman, M.D., evaluated applicant in 2016 as a psychiatric IME for her claim for
22 disability retirement. (Defendant's Exhibit C, Report of IME Richard Lieberman, M.D., December 18,
23 2016.) His report was also addressed to the Sacramento County Employees Retirement System. (*Id.* at
24 p. 1.) Dr. Lieberman described the purpose of his examination as follows:

25 At your request, I met with Elisha Harden, whom I saw for a
26 comprehensive psychiatric examination in my Sacramento office...It is my
27 understanding that I am acting as an Independent Medical Examiner in this
case.

(*Id.*)

1 As part of Dr. Lieberman's examination, applicant was given psychological testing, which was
2 independently scored by Bernard Bauer, Ph.D. (*Id.*) Dr. Bauer provided the results of the testing in a
3 separate report. (Defendant's Exhibit D, Report of Dr. Bernard Bauer, Ph.D, November 18, 2016.)

4 On April 24, 2019, defendant served applicant with a copy of the reports of Dr. McCoy, Dr.
5 Lieberman and Dr. Bauer. (Defendant's Exhibit G, Letter from defendant, April 24, 2019.) Defendant's
6 cover letter with these enclosures stated: "We will be providing these medical reports to QME Dr.
7 Wantuch and AME Dr. Mandell in 20 days absent a timely objection from your office." (*Id.*)

8 On May 8, 2019, applicant sent a response to defendant's letter stating in relevant part:

9 **This shall serve as my formal objection to providing the above reports**
10 **to the AME.**

11 ...

12 As Drs. McCoy, Lieberman and Bauer, all served as evaluators for
13 disability retirement benefits, outside of this workers' compensation case,
14 we hereby object to the introduction of their reports in the medical-legal
15 aspect of this matter under 8 CCR Section 35(e) and labor Code Section
16 4060 and 4062. You will need to get court approval if you wish to provide
17 these reports to the AME.

18 (Defendant's Exhibit H, Letter from Applicant attorney, May 8, 2019, pp.
19 1-2, emphasis in original.)

20 The matter proceeded to trial on July 10, 2019. (Minutes of Hearing, July 10, 2019.) The parties
21 stipulated at trial that applicant has sustained injury arising out of and in the course of employment
22 (AOE/COE) to the cervical spine, lumbar spine and psyche. (*Id.* at p. 2.) The sole issue for trial was
23 identified as:

24 Whether the reports of Dr. Joseph McCoy, Dr. Richard Lieberman, and Dr.
25 Bernard Bauer obtained in the disability retirement proceeding shall be
26 provided to the QME Dr. Elizabeth Wantuch and Dr. Peter Mandell over
27 Applicant's objection.

(*Id.*)

28 In the resulting F&O, the WCJ adopted and incorporated the stipulations set forth at trial. The
29 WCJ also found that defendant shall not provide the reports of Dr. Lieberman, Dr. Bauer and Dr. McCoy
30 to the QME Dr. Wantuch and the AME Dr. Mandell. These reports were ordered inadmissible and

1 defendant was ordered not to provide the reports to Dr. Wantuch and Dr. Mandell. In the Opinion on
2 Decision, the WCJ explained the rationale for the F&O as follows in pertinent part:

3 These reports are not reports of a treating physician, a primary treating
4 physician, a secondary physician, or a consulting physician and were not
5 obtained pursuant to the medical-legal process under Labor Code sections
6 4060 through 4062. These reports were not privately obtained by applicant
7 pursuant to Labor Code section 4605. These three reports were obtained to
8 determine whether applicant qualified for a disability retirement. The
9 reports address issues of permanent impairment and permanent disability.

10 ...
11 These three reports were obtained to determine applicant's eligibility for
12 disability retirement in an arena totally separate from the workers'
13 compensation process and that may or may not have a different standard.
14 Allowing defendant to forward the reports of Dr. Lieberman, Dr. Bauer,
15 and Dr. McCoy to the medical-legal evaluators in this case would
16 undermine the exclusive procedure set forth in Labor Code sections 4060,
17 4061, 4062, 4062.1 and 4062.2.

18 (Opinion on Decision, August 20, 2019, pp. 7-8.)

19 In its Petition for Removal, defendant contends that newly discovered evidence in the form of
20 QME Dr. Wantuch's August 30, 2019 deposition mandates a replacement psychiatric QME panel. In the
21 deposition, Dr. Wantuch purportedly testified that she was hired and compensated by applicant to act as
22 an expert witness with respect to her disability retirement claim.

23 Pleadings in the record of proceedings reflect that applicant agreed with defendant that a
24 replacement psychiatric QME panel was warranted. (Answer to Petition for Replacement Panel,
25 September 23, 2019.) The matter proceeded to a hearing on October 14, 2019, at which time an order for
26 a replacement QME panel in psychiatry was issued. (Minutes of Hearing, October 14, 2019.) Since this
27 issue has been resolved, we make no further comment on this issue herein.

DISCUSSION

I.

 Defendant filed its Petition seeking removal of the F&O. If a decision includes resolution of a
"threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an
ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006)

1 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc.) Threshold issues include, but are not
2 limited to, the following: injury arising out of and in the course of employment, jurisdiction, the
3 existence of an employment relationship and statute of limitations issues. (See *Capital Builders*
4 *Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81
5 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later
6 challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, §
7 5904.)² Alternatively, non-final decisions may later be challenged by a petition for reconsideration once
8 a final decision issues.

9 A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory
10 issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for
11 reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a
12 hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals
13 Board will evaluate the issues raised by the petition under the removal standard applicable to non-final
14 decisions.

15 The F&O adopted and incorporated the parties' stipulations at trial, which included a finding of
16 injury AOE/COE to the cervical spine, lumbar spine and psyche. Injury AOE/COE is a threshold issue
17 fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to
18 reconsideration rather than removal.

19 II.

20 Although the F&O contains a finding that is final, defendant is only challenging the finding that
21 these specific medical reports may not be provided to the medical-legal evaluators. This is an
22 interlocutory decision and is subject to the removal standard rather than reconsideration pursuant to the
23 discussion above. (See *Gaona, supra.*)

24 Section 4062.3 provides in relevant part, as follows:

25 (a) Any party may provide to the qualified medical evaluator selected from
26 a panel any of the following information:

27 ² All further statutory references are to the Labor Code unless otherwise stated.

1 (1) Records prepared or maintained by the employee's treating
2 physician or physicians.

3 (2) Medical and nonmedical records relevant to determination of
4 the medical issue.

5 (b) Information that a party proposes to provide to the qualified medical
6 evaluator selected from a panel shall be served on the opposing party 20
7 days before the information is provided to the evaluator. If the opposing
8 party objects to consideration of nonmedical records within 10 days
9 thereafter, the records shall not be provided to the evaluator. Either party
10 may use discovery to establish the accuracy or authenticity of nonmedical
11 records prior to the evaluation.

12 (c) If an agreed medical evaluator is selected, as part of their agreement on
13 an evaluator, the parties shall agree on what information is to be provided
14 to the agreed medical evaluator.

15 (Lab. Code, § 4062.3(a)-(c).)

16 Defendant contends that section 4062.3(b) does not apply to medical records and reports
17 proposed to be served to a QME. We disagree.

18 In *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (Appeals Board en banc), the
19 Appeals Board analyzed section 4062.3 and its application. The decision noted that section 4062.3(a)(2)
20 "provides that any party may provide to the QME '[m]edical and nonmedical records relevant to
21 determination of the medical issue,' " but the Labor Code treats medical records and nonmedical records
22 differently. (*Id.* at p. 1811.) It was noted that section 4062.3(b) provides a specific time within which to
23 object to nonmedical records proposed to be served to the QME. (*Id.* at p. 1812.) The decision went on
24 to state:

25 Although section 4062.3(b) does not give a specific timeline for the
26 opposing party to object to the QME's consideration of medical records,
27 the opposing party must object to the provision of medical records to the
QME within a reasonable time in order to preserve that objection.

(*Id.*)

It was acknowledged in a footnote that "section 4062.3(b) is silent regarding the course of action if the
opposing party objects to consideration of *medical* records proposed to be provided to the QME." (*Id.* at

1 p. 1812, fn. 10, emphasis in original.)

2 While section 4062.3(b) does not provide a specific timeline within which to object to service of
3 medical records to the QME, this does not preclude a party from objecting to service of medical records,
4 i.e., “information,”³ proposed to be sent to a medical-legal evaluator. In *Suon*, the Appeals Board stated
5 that the “20-day time period [in section 4062.3(b)] indicates an intent to provide the parties with an
6 opportunity to review the proposed information and informally agree on what information may be
7 provided to the QME.” (*Suon, supra*, 83 Cal.Comp.Cases at p. 1812.) The decision then cited Civil
8 Code section 3532, which provides that “[t]he law neither does nor requires idle acts.” (*Id.*; Civ. Code, §
9 3532.) Requiring service on the opposing party of medical records proposed to be served to the QME 20
10 days in advance, but precluding the opposing party from objecting to service of those records to the QME
11 would frustrate the presumed intent of the statute and render meaningless the requirement for advance
12 service of such records.

13 With respect to service on the orthopedic AME, section 4062.3(c) requires the parties to agree on
14 what information will be served to the AME. Since the parties were unable to agree on whether to serve
15 this information to the AME, the Appeals Board has the authority to determine whether these records
16 may be served to the AME, Dr. Mandell. (*Suon, supra*, 83 Cal.Comp.Cases at p. 1814 [the trier of fact
17 has the authority to determine what information may be provided to the QME if the parties cannot
18 informally agree on what information to provide to the QME].)⁴

19 We therefore reject defendant’s contention that section 4062.3 does not apply to the medical
20 records it proposes to serve to the psychiatric QME and the orthopedic AME.

21 III.

22 Section 4060 provides as follows in relevant part:
23

24 ³ See *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136, 138 (Appeals
25 Board en banc) [“information” includes medical and nonmedical records relevant to determination of the medical issues].
26 The medical records in dispute in this matter are undoubtedly information as defined in *Maxham*.

27 ⁴ It is acknowledged that *Suon* addressed whether the trier of fact has the authority to address what information may be
provided to a QME. We can discern no reason why the trier of fact would not also have the authority to determine what
information may be provided to the evaluator where the parties have agreed to use an AME.

1 (a) This section shall apply to disputes over the compensability of any
2 injury. This section shall not apply where injury to any part or parts of the
3 body is accepted as compensable by the employer.

3 ...
4 (c) If a medical evaluation is required to determine compensability at any
5 time after the filing of the claim form, and the employee is represented by
6 an attorney, a medical evaluation to determine compensability shall be
7 obtained only by the procedure provided in Section 4062.2.

8 (Lab. Code, § 4060(a) and (c).)

9 Section 4061 states, in pertinent part:

10 (b) If either the employee or employer objects to a medical determination
11 made by the treating physician concerning the existence or extent of
12 permanent impairment and limitations or the need for future medical care,
13 and the employee is represented by an attorney, a medical evaluation to
14 determine permanent disability shall be obtained as provided in Section
15 4062.2.

16 ...
17 (i) With the exception of an evaluation or evaluations prepared by the
18 treating physician or physicians, no evaluation of permanent impairment
19 and limitations resulting from the injury shall be obtained, except in
20 accordance with Section 4062.1 or 4062.2. Evaluations obtained in
21 violation of this prohibition shall not be admissible in any proceeding
22 before the appeals board.

23 (Lab. Code, § 4061(b) and (i).)

24 Section 4062 addresses objections to medical determinations not covered by section 4060 or 4061. (Lab.
25 Code, § 4062(a).) Section 4062.2 outlines the process to obtain a comprehensive medical evaluation in a
26 represented case for a dispute pursuant to section 4060, 4061 or 4062. (Lab. Code, § 4062.2.)

27 Section 4605 states as follows:

Nothing contained in this chapter shall limit the right of the employee to
provide, at his or her own expense, a consulting physician or any attending
physicians whom he or she desires. Any report prepared by consulting or
attending physicians pursuant to this section shall not be the sole basis of
an award of compensation. A qualified medical evaluator or authorized
treating physician shall address any report procured pursuant to this section
and shall indicate whether he or she agrees or disagrees with the findings or
opinions stated in the report, and shall identify the bases for this opinion.

(Lab. Code, § 4605.)

1 Administrative Director (AD) Rule 35(e) states as follows regarding provision of information to a
2 QME or AME:

3 In no event shall any party forward to the evaluator: (1) any medical/legal
4 report which has been rejected by a party as untimely pursuant to Labor
5 Code section 4062.5; (2) any evaluation or consulting report written by any
6 physician other than a treating physician, the primary treating physician or
7 secondary physician, or an evaluator through the medical-legal process in
8 Labor Code sections 4060 through 4062, that addresses permanent
9 impairment, permanent disability or apportionment under California
10 workers' compensation laws, unless that physician's report has first been
ruled admissible by a Workers' Compensation Administrative Law Judge;
or (3) any medical report or record or other information or thing which has
been stricken, or found inadequate or inadmissible by a Workers'
Compensation Administrative Law Judge, or which otherwise has been
deemed inadmissible to the evaluator as a matter of law.

11 (Cal. Code Regs., tit. 8, § 35(e).)

12 The parties do not dispute that the reports of Drs. McCoy, Lieberman and Bauer were issued in
13 relation to applicant's claim for disability retirement. The issue is whether these reports may be provided
14 to the orthopedic AME and psychiatric QME for applicant's workers' compensation claim. We conclude
15 that these reports are admissible in this matter and may be provided to the medical-legal evaluators since
16 they are relevant to determination of the medical issues.

17 In determining whether to admit evidence, we are governed by the principles of section 5708,
18 which states that the Appeals Board "shall not be bound by the common law or statutory rules of
19 evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which
20 is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and
21 provisions of this division." (Lab. Code, § 5708.) The right to present evidence implicates the right to
22 due process. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 175 [36 Cal.Comp.Cases
23 93]; *Pence v. Industrial Acci. Com.* (1965) 63 Cal.2d 48, 51 [30 Cal.Comp.Cases 207].)

24 In *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases
25 1209], the Supreme Court evaluated the admissibility of medical reports in workers' compensation
26 proceedings:

27 Under section 4064, subdivision (d), "no party is prohibited from obtaining
any medical evaluation or consultation at the party's own expense," and

1 “[a]ll comprehensive medical evaluations obtained by any party shall be
2 admissible in any proceeding before the appeals board . . .” except as
3 provided in specified statutes. The Board is, in general, broadly authorized
4 to consider “[r]eports of attending or examining physicians.” (§ 5703,
5 subd. (a).) These provisions do not suggest an overarching legislative
6 intent to limit the Board’s consideration of medical evidence.

7 In *Valdez*, the Supreme Court interpreted the Labor Code as favoring the admissibility of medical
8 reports in workers’ compensation proceedings. Subsequent to *Valdez*, the Court of Appeal issued its
9 decision in *Batten v. Workers’ Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases
10 1256]. In *Batten*, the Court of Appeal opined that only section 4061 of the five sections identified in
11 section 4064(d) contains an express prohibition on the admissibility of a medical evaluation. (*Id.* at p.
12 1014.) None of the other statutes identified in section 4064(d) prohibits the admissibility of a
13 comprehensive medical evaluation. The *Batten* Court ultimately held that neither section 4605 nor
14 section 4601(i) “permits the admission of a report by an expert who is retained solely for the purpose of
15 rebutting the opinion of the panel qualified medical expert’s opinion.” (*Id.* at p. 1016.)

16 The thrust of the Opinion on Decision in this matter is that the reports from Drs. McCoy,
17 Lieberman and Bauer were not obtained in accordance with any provision in the Labor Code and are not
18 treating reports. None of these reports may be deemed a comprehensive medical evaluation under
19 section 4062.2 or a report obtained per sections 4605 or 4064(d). They were not issued in relation to
20 applicant’s workers’ compensation claim. These reports are not being offered into evidence as a
21 comprehensive medical evaluation. Therefore, whether the reports are compliant with the medical-legal
22 process mandated by section 4062.2, or were permissibly obtained per sections 4605 or 4064(d), is not
23 relevant to their admissibility.

24 AD Rule 35(e) precludes provision to a medical-legal evaluator of “any evaluation or consulting
25 report written by any physician other than a treating physician, the primary treating physician or
26 secondary physician, or an evaluator through the medical-legal process in Labor Code sections 4060
27 through 4062, that addresses permanent impairment, permanent disability or apportionment *under*
28 *California workers’ compensation laws.*” (Cal. Code Regs., tit. 8, § 35(e), emphasis added.) Drs.
29 McCoy, Lieberman and Bauer did not address the issues of permanent impairment, permanent disability

1 or apportionment under the state workers' compensation laws. Instead, their reports address applicant's
2 eligibility for disability retirement from her employer. As acknowledged in the F&O, this is "an arena
3 totally separate from the workers' compensation process." Therefore, this portion of AD Rule 35(e) does
4 not bar provision of these reports to the QME or AME.

5 Under *Batten*, expert medical reports may be inadmissible if obtained for the sole purpose of
6 rebutting the opinion of the panel QME. None of the reports in dispute may be characterized as obtained
7 for this purpose.

8 Section 4062.3(a) permits any party to provide to the medical-legal evaluator medical records
9 "relevant to determination of the medical issue." This language is fairly expansive. In determining
10 whether the disputed medical records may be considered "relevant," it is noted that the Evidence Code
11 defines relevant evidence as "having any tendency in reason to prove or disprove any disputed fact that is
12 of consequence to the determination of the action." (Evid. Code, § 210.) This definition has been
13 characterized as "manifestly broad." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.)

14 Dr. McCoy evaluated the nature and extent of applicant's neck and back condition resulting from
15 her industrial injury. Dr. Lieberman, in coordination with Dr. Bauer, similarly evaluated applicant's
16 psychiatric condition in relation to her industrial injury. These are the same body parts pled in
17 applicant's workers' compensation claim and involve the same injurious incident. We therefore
18 conclude that these reports are relevant to determination of the medical issues in applicant's workers'
19 compensation claim and may be provided to the orthopedic and psychiatric medical-legal evaluators.

20 In conclusion, we will rescind the F&O. We will issue a new decision finding that applicant
21 sustained injury AOE/COE (per the parties' stipulation) and that the reports of Dr. McCoy, Dr.
22 Lieberman and Dr. Bauer may be provided to the orthopedic AME Dr. Mandell and the psychiatric
23 QME. We will also order applicant's objection to provision of these reports to the medical-legal
24 evaluators overruled.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings and Orders and Opinion on Decision issued by the WCJ on August 20, 2019 is
4 **RESCINDED** in its entirety and the following is **SUBSTITUTED** in its place:

5 **FINDINGS OF FACT**

- 6 1. Elisha Harden, born _____, while employed on November 14, 2012
7 as a probation assistant at Sacramento, California, by the County of
8 Sacramento, sustained injury arising out of and in the course of
9 employment to the cervical spine, lumbar spine and psyche.
10 2. The reports of Dr. Joseph McCoy, Dr. Richard Lieberman and Dr.
Bernard Bauer may be provided to the orthopedic AME Dr. Peter
Mandell and the psychiatric QME.

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1 **ORDER**

2 **IT IS HEREBY ORDERED** that applicant's objection to provision of the
3 reports of Dr. Joseph McCoy, Dr. Richard Lieberman and Dr. Bernard
4 Bauer to the orthopedic AME Dr. Peter Mandell and the psychiatric QME
5 is overruled.


6 **WORKERS' COMPENSATION APPEALS BOARD**

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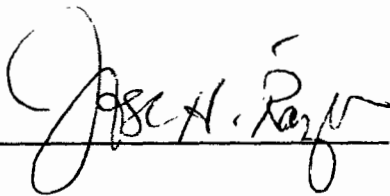
CHAIR

8 **KATHERINE ZALEWSKI**

9 **I CONCUR,**

10 
11 _____
12 **CRAIG SNELLINGS**

13 **I DISSENT. (See Attached Dissenting Opinion.)**

14 
15 _____
16 **JOSÉ H. RAZO**



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

18 **DEC 13 2019**

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

21 **ELISHA HARDEN**
22 **LAUGHLIN, FALBO, LEVY & MORESI**
23 **LAW OFFICES OF JONATHAN BRAND**

24 **AI/pc**

1 **DISSENTING OPINION OF COMMISSIONER RAZO**

2 I respectfully dissent. I would affirm the WCJ because defendant has not shown that the decision
3 will cause irreparable harm or significant prejudice. Furthermore, for the reasons discussed below, my
4 dissent emphasizes the need to follow the legislative dictates in creating and regulating the workers'
5 compensation system.

6 The parties may not circumvent the requirements of section 4062.2 in order to admit into
7 evidence medical reporting that was not prepared in compliance with the Labor Code. Defendant cannot
8 backdoor into the record evidence that implicitly addresses applicant's level of permanent impairment
9 and limitations from her industrial injury, and is therefore inadmissible under section 4061(i). (See
10 *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009, 1014 [80 Cal.Comp.Cases 1256].)
11 The majority view allows parties to circumvent the legislative intent to disallow privately retained
12 medical experts. The current workers' compensation system in California is designed to provide two
13 separate and structured medical evaluation paths to obtaining medical-legal evaluations. For medical
14 treatment disputes, the Legislature created the utilization review (UR) process and independent medical
15 review (IMR). For other disputes regarding AOE/COE, injury, causation, disability, etc., the Legislature
16 enacted the agreed medical evaluator (AME) and the panel qualified medical evaluator (QME) selection
17 process to enable parties to obtain medical-legal evaluations on these issues. The legislative intent is to
18 avoid "doctor shopping" and to keep litigation costs down. To allow the parties in this case to deviate
19 from the procedures outlined in sections 4062-4062.2 opens the door to enable other types of medical-
20 legal reports to be admissible outside of the legislative mandated process.

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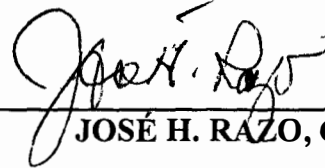
1 Therefore, I dissent. I would affirm the WCJ's decision that the reports of Dr. Lieberman, Dr.
2 Bauer and Dr. McCoy may not be provided to the orthopedic AME or the psychiatric QME.



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WORKERS' COMPENSATION APPEALS BOARD

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JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DEC 13 2019

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

**ELISHA HARDEN
LAUGHLIN, FALBO, LEVY & MORESI
LAW OFFICES OF JONATHAN BRAND**

JR/pc

