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**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**CONCEPCION VASQUEZ,**

*Applicant,*

**vs.**

**PROVIDENCE SAINT JOSEPH MEDICAL  
CENTER; SEDGWICK CLAIMS  
MANAGEMENT SERVICES,**

*Defendants.*

**Case No. ADJ8641731  
(Van Nuys District Office)**

**OPINION AND ORDERS  
DISMISSING PETITION FOR  
RECONSIDERATION  
AND DENYING PETITION  
FOR REMOVAL**

Providence Saint Joseph Medical Center (defendant) seeks reconsideration of the Findings and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on August 2, 2016. In relevant part, the F&O denied defendant's request for a replacement Qualified Medical Evaluator (QME)<sup>1</sup> panel in the specialty of psychiatry.

Defendant contends that the WCJ erred in denying its request for a replacement QME panel in the specialty of psychiatry, arguing that QME Dr. Pretsky failed to respond to defendant's request for a supplemental report within the 60-day time limit set forth in Administrative Director Rule<sup>2</sup> 38(i) and, therefore, it is entitled to a replacement QME panel as requested.

The WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report). We have received an Answer to the Petition from applicant as well as a request by applicant for permission to file a Supplemental Answer pursuant to Appeals Board Rule<sup>3</sup> 10848. We will accept applicant's Supplemental Answer. We have considered the allegations of the Petition, the WCJ's Report with respect

<sup>1</sup> A Qualified Medical Evaluator (QME) means a licensed physician appointed by the Administrative Director pursuant to Labor Code section 139.2 to conduct comprehensive medical-legal evaluations of industrially injured workers. (Cal. Code Regs., tit. 8, § 1(z).)

<sup>2</sup> The Rules promulgated by the Administrative Director are set forth in California Code of Regulations, Title 8, beginning with section 1. (Cal. Code Regs., tit. 8, § 1.)

<sup>3</sup> The Rules of the Appeals Board are set forth in California Code of Regulations, Title 8, beginning with section 10300.

1 thereto, the Answer filed by applicant, and the Supplemental Answer filed by applicant. Based upon our  
2 review of the record; for the reasons set forth in the WCJ's Report, which we adopt and incorporate and  
3 for the reasons set forth in the following discussion, we will dismiss defendant's Petition as a Petition for  
4 Reconsideration. Additionally, treating defendant's Petition as a Petition for Removal, we will deny  
5 removal.

### 6 RELEVANT FACTS

7 Concepcion Vasquez (applicant), while employed by defendant as a Registered Nurse on August  
8 6, 2012, sustained injury arising out of and occurring in the course of her employment to her cervical,  
9 thoracic and lumbar spine, and also claims a compensable injury to her psyche.

10 Dr. Joshua Pretsky was chosen as the Panel QME in psychiatry. Dr. Pretsky evaluated applicant  
11 on December 15, 2014, and issued a comprehensive report of his re-evaluation<sup>4</sup> on January 10, 2015  
12 (Exhibit X3.)

13 By letter dated January 27, 2015, defendant requested a supplemental report from Dr. Pretsky that  
14 addresses non-industrial apportionment from a psychiatric standpoint. (Exhibit Y1.)

15 On April 29, 2015, applicant's attorney requested that Dr. Pretsky review a medical report from  
16 Dr. Cohenour and issue a supplemental report. (Exhibit 5.)

17 By letter to Dr. Pretsky dated May 11, 2015, defendant objected to the request from applicant's  
18 attorney for a supplement report on the basis that it had not been served with Dr. Cohenour's October 19,  
19 2013 report. (Exhibit 3.)

20 Applicant's attorney wrote to Dr. Pretsky again on June 1, 2015 (Exhibit 4), advising Dr. Pretsky  
21 that defendant had been previously served with Dr. Cohenour's report, but was being served with another  
22 courtesy copy. The letter requests that Dr. Pretsky issue a supplemental report as previously  
23 requested. (*Id.*)

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26 \_\_\_\_\_  
27 <sup>4</sup> We note that the WCJ's Report states that Dr. Pretsky's initial comprehensive evaluation of applicant issued in June 2014,  
and that the report dated January 10, 2015 is a supplemental report. Defendant does not claim untimeliness with regard to Dr.  
Pretsky's initial June 2014 report.

1 In response to the request from applicant's attorney, Dr. Pretsky served his supplemental report  
2 on August 6, 2015. (Exhibit X2.)<sup>5</sup>

3 On June 24, 2015, defendant sent a letter to Dr. Pretsky requesting that he review recently  
4 obtained sub-rosa film of applicant and issue a supplemental report. (Exhibit Y2.) The letter notes that  
5 Dr. Pretsky's January 10, 2015 supplemental report included the review of sub-rosa film of applicant, but  
6 advises since that report issued, defendant obtained additional film taken in February, March and May of  
7 2015 and requests that the new film be reviewed and commented upon. (*Id.*)

8 Prior to the expiration of the 60-day time period from the date of the defendant's June 24, 2015  
9 request to Dr. Pretsky requesting a supplemental report concerning sub-rosa film, defendant objected to  
10 the untimeliness of Dr. Pretsky's reporting and requested a replacement panel. (Exhibit C.) Defendant's  
11 August 4, 2015 letter to Dr. Pretsky states:

12 As you are aware, defendants sent you a Supplemental Position Statement  
13 dated January 27, 2015 requesting that you issue a supplemental report.  
14 To date, our office has not received any supplemental report from you in  
15 this regard, in violation of CCR 38(1).

16 Please be advised that defendants hereby object to any further reporting  
17 from you. Please take no further action in this matter. (*Id.*)

18 Defendant then filed a motion to compel the Medical Unit to issue a replacement QME panel in  
19 the specialty of psychiatry. The issue of defendant's entitlement to a replacement QME panel came to  
20 trial on July 20, 2016. Documentary evidence was received, the matter was submitted, and on August 2,  
21 2016, the WCJ issued the F&O that is the subject of the instant Petition for Reconsideration.

### 22 DISCUSSION

23 At the outset, we observe that defendant seeks reconsideration to challenge the WCJ's decision  
24 denying defendant's request for a replacement QME panel in the specialty of psychiatry. Although a  
25 number of recent panel decisions have struggled over whether a Petition for Reconsideration or a Petition  
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27 <sup>5</sup> Dr. Pretsky's report is dated July 7, 2015, and includes a proof of service showing service upon the parties on August 6, 2015.

1 for Removal is the proper method to challenge such a decision<sup>6</sup>, we have reached the conclusion that  
2 under the facts before us in this case, removal is the most appropriate procedure because the F&O is not a  
3 final order, decision or award from which reconsideration can be sought under Labor Code<sup>7</sup> section 5900.  
4 An order which does not finally dispose of the substantive rights and liabilities of the parties involved in  
5 a case is not a final order. (2 California Workers' Compensation Practice (4th Ed. Cal. CEB 2000) §§  
6 21.8-21.9, pp. 1273-1275.) A "final" order has been defined as one "which determines any substantive  
7 right or liability of those involved in the case." (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81  
8 Cal.App.4th 1068 [65 Cal.Comp.Cases 650]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.*  
9 (*Pointer*) (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410-413]; *Kaiser Foundation Hospitals v.*  
10 *Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661].) In this  
11 case, we believe that the F&O is most accurately characterized as a discovery order on the procedural  
12 matter of whether the circumstances surrounding Dr. Pretsky's supplemental reporting require a  
13 replacement QME. That conclusion is not a final determination of liability from which reconsideration  
14 can be properly taken. Therefore, we will dismiss defendant's Petition as a Petition for Reconsideration,  
15 and treat it instead as a Petition for Removal.

16 We next address defendant's Petition as a Petition for Removal. Section 5310 authorizes the  
17 Appeals Board to remove to itself the proceedings on any claim. Of course, we recognize that the  
18 Appeals Board's removal authority is an extraordinary remedy which is rarely exercised. (*Cortez v.*  
19 *Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn.  
20 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70  
21 Cal.Comp.Cases 133, 136, fn. 2].) Instead, the Appeals Board will grant removal only if the petitioner  
22

23 <sup>6</sup> Those panel decisions focused on the 2004 statutory changes to the resolution of medical-legal disputes that now require the  
24 use of QME panels from which each party is allowed one strike, with the remaining panel member designated as the QME in  
25 the case. (Lab. Code, § 4062.2.) The QME conducts the comprehensive medical-legal evaluation of the employee and  
26 provides opinions on all disputed medical issues in the case. Thus, a QME's opinions are paramount and will presumably  
27 resolve each disputed medical issue in a particular case. Even so, we do not believe that whether the QME report was timely  
or whether a QME replacement panel should issue is a final decision subject to reconsideration because such decision is not  
one that determines the substantial rights and liabilities of the parties involved in the case. (See *Kaiser Foundation Hospitals*  
*v. Workers' Comp. Appeals Bd.* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]; *Safeway Stores, Inc. v. Workers'*  
*Comp. Appeals Bd. (Pointer)* 104 Cal.App.3d 528, 531-535 [45 Cal.Comp.Cases 410].)

<sup>7</sup> All statutory references hereinafter are to the Labor Code unless otherwise indicated.

1 shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code  
2 Regs., tit. 8, § 10843(a); see also *Cortez, supra*; *Kleemann, supra*.) Further, the petitioner must also  
3 demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the  
4 petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).) In this case, defendant has failed to  
5 make such a showing. Defendant was given the opportunity to demonstrate its entitlement to a  
6 replacement psychiatric QME panel in an evidentiary hearing. The denial of its panel replacement  
7 request is not, in and of itself, tantamount to substantial prejudice and/or irreparable harm. As the WCJ's  
8 Report notes, defendant still has an opportunity to further develop the record in this case with a  
9 supplemental report or the deposition of Dr. Pretsky. Therefore, we are persuaded that the WCJ was  
10 correct in recommending that defendant's Petition also be denied as a Petition for Removal.

11 Finally, although we adopt and incorporate the WCJ's Report, we have chosen to include a  
12 separate discussion regarding whether or not defendant's actions in waiting approximately six months to  
13 object to the timeliness of Dr. Pretsky's supplemental reporting constitutes a waiver of the objection. We  
14 are not aware of any precedential authority in support of that argument. There are, however, several  
15 panel decisions<sup>8</sup> that are relevant and persuasive. We find most informative the decision in *Corrado v.*  
16 *Aquafine Corporation* 2016 Cal. Wrk. Comp. P.D. Lexis 318. In that case, the parties agreed that  
17 although the panel QME's initial report issued timely, the QME did not issue a timely supplemental  
18 report pursuant to Administrative Director Rule 38(1)<sup>9</sup>. Applicant later requested that a replacement  
19 QME panel issue because of the QME's untimely supplemental report. Defendant objected to applicant's  
20 request, contending that a QME's failure to timely issue a supplemental report cannot be the basis for a  
21 replacement panel under section 4062.5. After a hearing, the WCJ granted applicant's request and  
22 ordered that a replacement panel issue in the specialty of orthopedics. Defendant sought removal or,  
23

24 <sup>8</sup> Appeals Board panel decisions are not binding precedent on WCJs and other Appeals Board panels in the same manner as an  
25 en banc opinion of the Appeals Board. (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 [67  
26 Cal.Comp.Cases 236].) They are, however, citeable authority, especially on issues concerning the contemporaneous  
administrative construction of statutory language. (*Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260 [54  
Cal.Comp.Cases 145].)

27 <sup>9</sup> Cal. Code Regs., tit. 8, § 38(i) requires that the QME supplemental report issue within 60 days of the date of the request,  
unless the parties have agreed to a 30-day extension of the 60-day time limit.

1 alternatively, reconsideration of the WCJ's decision. The Appeals Board Panel granted removal and  
2 rescinded the WCJ's decision.

3 The panel's opinion reviews the statutes and regulations pertaining to QME reporting and  
4 supplemental reporting: specifically, section 4062.5, section 139.2, Administrative Director Rule 31.5,  
5 and Administrative Director Rule 38. The opinion notes that section 139.2(j)(1)(A) requires the  
6 Administrative Director to adopt rules pertaining to the time frames within which QME reports must be  
7 prepared and submitted, and acknowledges that the initial QME report must be prepared and submitted  
8 no more than 30 days after the evaluator has seen the employee. Its discussion of Administrative  
9 Director Rule 38 observes that although the rule requires the initial report to be completed within the 30-  
10 day time period set forth in section 139.2(j), the time period for the submission of supplemental reports is  
11 60 days. (*Corrado v. Aquafine Corp.* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 318, n. 3-4.)

12 Next, the opinion examines section 4062.5 and Administrative Director Rule 31.5, noting that the  
13 former is the only Labor Code section that mandates the replacement of a QME because of untimely  
14 reporting. It recognizes that the section specifically references the initial formal medical evaluation that  
15 must be submitted within 30 days of the evaluation, not a supplemental evaluation. The opinion reasons  
16 that all provisions of section 4062.5 must apply in order for replacement of a QME to be mandatory, and  
17 when they do not, replacement of the QME is discretionary, upon a showing of good cause. (*Corrado*,  
18 *supra*, n. 4.) The opinion then reviews the language within Administrative Director Rule 31.5, which  
19 governs QME replacement requests. It notes the language of subsection (a)(12)<sup>10</sup> and comments that  
20 replacement of the QME is only required where the QME fails to meet the deadlines in both section  
21 4062.5 and Administrative Director Rule 38. Since section 4062.5 only mandates replacement of the  
22 QME where the initial formal medical evaluation is untimely, the panel concludes that replacement of the  
23 QME is not required if a supplemental report issues beyond the 60-day time period in Administrative  
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25  
26 <sup>10</sup> Administrative Director Rule 31.5(a)(12) states: The evaluator failed to meet the deadlines specified in Labor Code section  
27 4062.5 and section 38 (Medical Evaluation Time Frames) of Title 8 of the California Code of Regulations and the party  
requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report. A  
party requesting a replacement on this ground shall attach to the request for a replacement a copy of the party's objection to  
the untimely report.

1 Director Rule 38(i). In such instance, replacement is discretionary and must be based upon a good cause  
2 showing. (*Id.*, ns. 4-5.) In conclusion, the opinion suggests the following factors be considered in  
3 determining whether or not a good cause showing has been made to warrant replacement of the QME:

- 4 1. The length of delay caused by the late report.
- 5 2. The amount of prejudice caused by the delay in issuing the  
6 supplemental report versus the amount of prejudice caused by  
7 restarting the QME process.
- 8 3. What efforts, if any, have been made to remedy the late reporting.
- 9 4. Case specific factual reasons that justify replacing or keeping the  
10 current QME, including whether a party may have waived the  
11 objection.
- 12 5. The constitutional mandate to “accomplish substantial justice in all  
13 cases expeditiously, inexpensively, and without incumbrance of any  
14 character.” (Cal. Const., art. XIV, § 4.) (*Corrado, supra*, ns. 5, 6.)

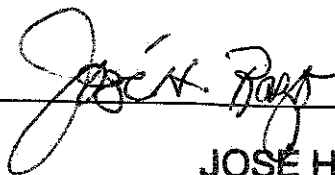
15 In this case, defendant could have attempted to remedy Dr. Pretsky’s failure to issue a  
16 supplemental report in response to its request shortly after expiration of the 60-day time period in  
17 Administrative Director Rule 38(i). Defendant did not do so. Further, while defendant did send a letter  
18 to Dr. Pretsky on May 11, 2015, that letter does not mention the January 27, 2015 request for a  
19 supplemental report or inquire as to the report’s status. We also observe that on June 24, 2015, defendant  
20 sent sub rosa film to Dr. Pretsky and requested that he review the film and issue a supplemental report.  
21 That letter also fails to inquire as to the status of defendant’s January 27, 2015 request for a supplemental  
22 report. In addition, it was not until August 4, 2015, over six months after defendant made its January 27,  
23 2015 request for a supplemental report, that it objected to the untimeliness of Dr. Pretsky’s reporting and  
24 requested a supplemental QME panel. Under these circumstances, a strong argument can be made that  
25 defendant waived its objection. Moreover, Dr. Pretsky has served as the psychiatric QME in this case  
26 since 2014. Replacement of Dr. Pretsky at this late date, especially in view of the fact that defendant  
27 could have but failed to take any steps to remedy the matter, is contrary to our Constitutional mandate to  
accomplish substantial justice in all cases in the most expeditious, inexpensive and unencumbered  
manner possible. For all of these reasons, we will deny defendant’s Petition for Removal.

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1 For the foregoing reasons,

2 **IT IS HEREBY ORDERED** that defendant's Petition for Reconsideration of the August 2, 2016  
3 Findings and Order is **DISMISSED**, and treating said Petition as a Petition for Removal, it is **DENIED**.

4  
5 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **JOSE H. RAZO**

10 **I CONCUR,**

11 

12 **FRANK M. BRASS**

13 **CONCURRING, BUT NOT SIGNING**

14 **DEPUTY**

15 **CRISTINE E. GONDAK**



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

17 **OCT 17 2016**

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

21 **CONCEPCION VASQUEZ**  
22 **EMPLOYMENT DEVELOPMENT DEPT., STATE DISABILITY INSURANCE**  
23 **LAW FIRM OF ROWEN, GURVEY & WIN**  
24 **LAW OFFICES OF LESTER J. FRIEDMAN**  
25 **PROVIDENCE SAINT JOSEPH MEDICAL CENTER**  
26 **SEDGWICK CMS**  
27 **STONESIFER & CHONG**



28 **SVH/ara**

