

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

[REDACTED] *Applicant*

vs.

[REDACTED] *permissibly self-insured,
administered by SEDGWICK CMS, Defendants*

Adjudication Number: [REDACTED]
Van Nuys District Office

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION**

Defendant seeks removal of the Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on May 10, 2021. By the F&O, the WCJ denied defendant's request to have the panel qualified medical evaluator (QME) replaced on the grounds that he violated the anti-ghostwriting statutes and for lack of a dated signature.

Defendant contends that the QME violated Labor Code section 4628 and therefore, his reports are inadmissible and a replacement QME panel must be issued. (Lab. Code, § 4628.)¹

We received an answer from applicant. The WCJ issued a Report and Recommendation of Workers' Compensation Administrative Law Judge on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition as one seeking reconsideration, rescind the F&O and issue a new decision granting defendant's request to strike the reporting of the QME. The matter will be returned to the trial level for further proceedings regarding the specialty of the replacement QME panel.

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

FACTUAL BACKGROUND

Applicant claims injury to the right hand, right elbow, right wrist, right shoulder, right upper extremity, neck, back, lower extremities, knees, fibromyalgia, feet, ankles, stress, hypertension, sleep disorder and diverticulitis through January 17, 2017 while employed as a cafeteria worker/manager by the [REDACTED]. [REDACTED] was selected as the pain management QME. A summary of medical records is contained on pages 16-22 of [REDACTED] January 9, 2018 report. (Joint Exhibit No. 7, Report by PQME [REDACTED], January 9, 2018, pp. 16-22.) The end of the report states as follows in relevant part:

Pursuant to WCAB Rule 10606, review of the patient's history, review of records, and examination were performed in their entirety by the undersigned. No assistance was obtained from any other person, with the exception of a translator when indicated.

...

DECLARATION PURSUANT TO AB 3660

I declare, under penalty of perjury, that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information I have indicated I have received by others.

As to that information, I declare, under penalty of perjury, that the information accurately describes the information provided to me end, except as noted herein, that I believe to be true.

(*Id.* at p. 32.)

The same language was contained in [REDACTED] June 4, 2019 and August 16, 2019 reports, which also both contained a summary of medical records. (Joint Exhibit No. 5, Report by PQME [REDACTED], August 16, 2019, pp. 2-4; Joint Exhibit No. 6, Report by PQME Lawrence [REDACTED], June 4, 2019, pp. 2-4.)

[REDACTED] was cross-examined on January 16, 2020. His deposition testimony includes the following exchange:

Q. OTHER THAN THE -- YOU SAID THAT YOU SENT OUT APPLICANT FOR SOME DIAGNOSTICS. DID ANYONE ELSE ASSIST YOU IN TAKING A MEDICAL HISTORY OR EVALUATING THIS CASE IN PRODUCING YOUR --

A. NO.

Q. -- REPORTS?

A. NO. JUST ME.

OH, I'M SORRY. THE RECORDS WERE SUMMARIZED -- I'M SORRY. THERE WAS A RECORD SUMMARY, BUT I DID THE -- I TOOK THE HISTORY MYSELF AND DID THE EXAMINATION ENTIRELY BY MYSELF, INCLUDING THE BLOOD PRESSURE.

BUT YOU'RE RIGHT, THE RECORDS WERE SUMMARIZED, THAT'S CORRECT.

Q. WHO DID THE SUMMARY?

A. THAT WAS WHEN I WAS WITH THIS FIRM OUT OF LAWNDALE, WHICH MAYBE THAT'S WHERE THAT NEXT REPORT WENT, THEY DIDN'T SEND TO ME. THAT WAS [REDACTED]. AND THEY HAVE A -- THEY DO A SUMMARY OF THE RECORDS. THEY PROVIDE ME THE ROUGH DRAFTS AND THEY ALSO DO A SUMMARY, WHICH I INCORPORATED.

Q. SO WHO THERE DID THAT?

A. OH, I DON'T KNOW THE NAME OF THE PERSON NECESSARILY.

Q. IS IT IN YOUR REPORT?

A. IF IT'S VERY NECESSARY, I WILL TRY TO FIND IT. I CAN'T FIND IT RIGHT NOW.

Q. IS IT IN YOUR REPORT?

A. NO. I DON'T -- I DON'T SEE IT.

...

Q. ...WE WILL START WITH THE AUGUST 16, '19 REPORT. JUST LOOK AT THAT AND SEE IF YOU REVIEWED THOSE RECORDS OR IF SOMEBODY ELSE DID.

A. THEY SUMMARIZED -- I REVIEWED THEM AND THEY WERE SUMMARIZED BY SOMEONE ELSE.

Q. SO THIS IS SOMEONE ELSE'S WRITING, THE SUMMARY OF RECORDS?

A. YES.

Q. OKAY. AND ON THIS PARTICULAR AUGUST 16, 2019 REPORT, DO YOU KNOW THE NAME OF THE PERSON WHO DID -- WROTE THAT SUMMARY?

A. NO.

Q. OKAY. WE WILL GO ON TO THE NEXT REPORT. ON JUNE 4, 2019, AGAIN, IT LOOKS LIKE YOU REVIEW –

A. JUST THE FISHMAN REPORT.

Q. THE FISHMAN REPORT.

AND IS THIS SUMMARY WRITTEN BY YOU OR SOMEBODY ELSE?

A. SOMEBODY ELSE.

Q. OKAY. AND ON THIS REPORT IS IT INDICATED WHO DID THAT SUMMARY?

A. NO.

(Joint Exhibit No. 9, Deposition transcript of [REDACTED], January 16, 2020, pp. 44:19 to 45:21, 45:25 to 46:21.)

[REDACTED] testified that [REDACTED] Mary Ann [REDACTED] prepared the summary of records contained in his report dated January 9, 2018. (*Id.* at pp. 46-48.) [REDACTED] was unaware of Ms. [REDACTED] credentials. (*Id.*)

[REDACTED] January 27, 2020 report contains a summary of records on pages 2-10. (Joint Exhibit No. 3, Report by PQME [REDACTED], January 27, 2020, pp. 2-10.) Page 11 contains the following language:

In addition, pursuant to Assembly Bill 3660, I declare under penalty of perjury, that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to that information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true.

Review of history with the patient, review of medical records, physical examination, reading of x-rays, medical dictation/review of final report by myself.

(*Id.* at p. 11.)

[REDACTED] March 23, 2020 report contained a summary of records on pages 3-5 and the same language at the end of the report as used in the January 27, 2020 report. (Joint Exhibit No. 2, Report by PQME [REDACTED], March 23, 2020, pp. 3-6.) His May 29, 2020 report has a summary of records from pages 3-37. (Joint Exhibit No. 1, Report by PQME [REDACTED] [REDACTED] May 29, 2020, pp. 3-37.) The end of the report states as follows in relevant part:

In addition, pursuant to Assembly Bill 3660, I declare under penalty of perjury, that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to that information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true.

Summary of medical records were done by Acu Trans Solutions, LLC. Review of history with the patient, review of medical records, physical examination; reading of x-rays, medical dictation/review of final report by myself.

(*Id.* at p. 37.)

[REDACTED] was cross-examined again on June 25, 2020. His testimony included the following exchanges:

A. There was quite a bit of records that were added and reviewed.

Q. Did you review those records yourself?

A. I looked at them, and they were also summarized by the QME company.

Q. What QME company?

A. Medical Legal Experts.

...

Q. What did Acu Trans Solutions actually do?

A. They reviewed the records. They summarized them as you see them in the report.

Q. So they provided the pages 4 through 36?

A. Yes.

Q. Okay. Did you write or dictate any of those words between pages 4 and 36?

A. No.

...

Q. Would you say Med-Legal did some of the summary of records in the other reports?

A. Yes, two different questions you're asking me. Who did the summary, and who reviewed the records. I am saying I reviewed the records on every report. Who prepared the summary, Med-Legal did the first one. And Acu Trans did the second one. So two different questions.

Q. Okay. Great. So Med-Legal did which one?

A. First one in May -- excuse me, January. The 2018. Excuse me. And the May 2020 was done by Acu Trans.

Q. Were any other reports reviewed, summaries provided by other entities?

A. Yes, let me go through them. Give me a minute. January I told you it was Med-Legal.

Q. And who did that one?

A. I told you January 2018 was Med-Legal.

Q. What's the name of the person and their qualifications?

A. I don't know. I don't remember. I don't know their qualifications. And I don't remember. I did the one in July -- the July 2005 on the June 4th report.

On the January 24th, '20 there was no review of records. On the August 16, 2019, that was done by Med-Legal.

Q. Do you know who and what their qualifications?

A. No, I don't know their qualifications. I don't. I don't. I don't know.

Q. You say --

A. I don't know their names.

Q. Okay. They did the summary, correct, that's located in your report?

A. That's right. March 23, '20, I think was Acu Trans. And so was the May 2020.

Q. And do you know who did -- we talked about the May 2020, who did the March 2020?

A. I don't know. I don't know.

Q. You don't know the qualifications either, correct?

A. Yeah. I don't know. But I check if someone is qualified.

(Joint Exhibit No. 8, Deposition transcript of Lawrence Miller, M.D., June 25, 2020, pp. 10:4-10, 25:5-12, 32:14 to 34:5.)

[REDACTED] further testified that [REDACTED] Khan of [REDACTED] Solutions summarized the medical records and that Mr. Khan is (possibly) an engineer. (*Id.* at p. 24.)

On August 21, 2020, defendant filed a Petition to Strike Reporting of PQME [REDACTED] and Request an Order for a Replacement Panel Issue in Orthopedic Surgery. Defendant argued that [REDACTED] reporting must be struck for violation of section 4628 and that the replacement QME panel should be issued in orthopedic surgery.

The matter proceeded to trial on April 14, 2021 on two issues:

1. Whether or not to strike the reporting of PQME [REDACTED] and order a replacement panel.
2. Whether or not the replacement panel should be in a different specialty, specifically orthopedic surgery.

(Minutes of Hearing, April 14, 2021, p. 2.)

In its trial brief, defendant reiterated its argument that [REDACTED] should be replaced as the QME for violating section 4628 and that the replacement QME panel should be issued in the specialty of orthopedic surgery. Applicant countered in her trial brief that [REDACTED] looked at all of the medical records even if he did not write the summary and can issue a supplemental report identifying the people who provided the review of medical records.

The WCJ issued the resulting F&O as outlined above. The WCJ did not address the specialty of a replacement panel since defendant's request for a replacement panel was denied.

DISCUSSION

I.

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

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

Here, the WCJ's decision includes a finding regarding injury AOE/COE to the right hand and right elbow. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.²

II.

Although the F&O contains a finding that is final, defendant is only challenging the WCJ's denial of its request that [REDACTED] be replaced as the QME. This is an interlocutory issue regarding evidence and discovery, and is subject to the removal standard rather than reconsideration. (See *Gaona, supra.*)

Section 4628 provides as follows in relevant part:

(a) Except as provided in subdivision (c), **no person, other than the physician who signs the medical-legal report**, except a nurse performing those functions routinely performed by a nurse, such as taking blood pressure, **shall examine the injured employee or participate in the nonclerical preparation of the report, including all of the following:**

² We will retain the finding of injury AOE/COE in the new decision pursuant to the parties' stipulations at trial. (Minutes of Hearing, April 14, 2021, p. 2; see also Lab. Code, § 5702.)

- (1) Taking a complete history.
- (2) **Reviewing and summarizing prior medical records.**
- (3) Composing and drafting the conclusions of the report.

(b) The report shall disclose the date when and location where the evaluation was performed; that the physician or physicians signing the report actually performed the evaluation; whether the evaluation performed and the time spent performing the evaluation was in compliance with the guidelines established by the administrative director pursuant to paragraph (5) of subdivision (j) of Section 139.2 or Section 5307.6 and shall disclose the name and qualifications of each person who performed any services in connection with the report, including diagnostic studies, other than its clerical preparation. If the report discloses that the evaluation performed or the time spent performing the evaluation was not in compliance with the guidelines established by the administrative director, the report shall explain, in detail, any variance and the reason or reasons therefor.

(c) If the initial outline of a patient's history or excerpting of prior medical records is not done by the physician, the physician shall review the excerpts and the entire outline and shall make additional inquiries and examinations as are necessary and appropriate to identify and determine the relevant medical issues.

...

(e) Failure to comply with the requirements of this section shall make the report inadmissible as evidence and shall eliminate any liability for payment of any medical-legal expense incurred in connection with the report.

(Lab. Code, § 4628(a)-(c), (e), emphasis added.)

Section 4628 "is a strict liability statute...at least insofar as the admissibility of a medical-legal report is concerned." (*Scheffield Medical Group v. Workers' Comp. Appeals Bd.* (1999) 70 Cal.App.4th 868, 881.) The statute was referred to by the Legislature "as an anti-ghostwriting statute." (*Id.*) "Its requirements were to ensure that the doctor who signed the report had actually examined the injured worker and had prepared the evaluation." (*Id.*) The statute has no "qualifying language...affording the Board discretion to determine whether the reliability of the report is affected." (*Id.*)

Section 4628(a)(2) requires the examining physician to *review and summarize* the prior medical records since this is considered nonclerical preparation of the report per the statute. The record in this matter reflects that [REDACTED] did not prepare the summary of medical records contained in some of his reports. Specifically, [REDACTED] testified that certain pages of his reports with a summary of applicant's medical records were prepared by other people. For some reports,

[REDACTED] was actually unaware of who prepared the summary of records or the qualifications of those people.

As outlined above, section 4628 is a strict liability statute. If the physician who prepared the report did not comply with the statute's requirements, there is no balancing of whether the failure to comply with its provisions affected the report's reliability. The reports are inadmissible as evidence per section 4628(e).

Consequently, we will rescind the F&O and issue a new decision finding that [REDACTED] reporting must be stricken and a replacement QME panel issued.

The WCJ did not address in the F&O the specialty of a replacement QME panel since he denied defendant's request to strike [REDACTED] reporting. We will defer the issue of the specialty of the replacement panel and return this matter to the trial level for the trier of fact to address this issue in the first instance.

In conclusion, we will grant the Petition as one seeking reconsideration, rescind the F&O and issue a new decision granting defendant's request to strike the reporting of the QME. The matter will be returned to the trial level for further proceedings regarding the specialty of the replacement QME panel.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Orders issued by the WCJ on May 10, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Orders issued by the WCJ on May 10, 2021 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant Felicia Sonnier, while employed during the period March 3, 1998 to January 17, 2017, as a cafeteria worker/manager, Occupational Group Number 322, at Los Angeles, California, by Los Angeles Unified School District, sustained injury arising out of and in the course of employment to her right hand and right elbow. She claims to have sustained injury arising out of and in the course of employment to her right wrist, right shoulder, right upper extremity, neck, back, right lower extremities, knees, fibromyalgia, feet, ankles, stress, hypertension, sleep disorder, and diverticulitis.
2. At the time of injury, the employer was permissibly self-insured and administrated by Sedgwick CMS.
3. The reporting of the panel qualified medical evaluator, Lawrence R. Miller, M.D., must be stricken for violation of section 4628 and a replacement QME panel issued.
4. The issue of specialty of the replacement QME panel is deferred.
5. All other issues are deferred.

ORDERS

IT IS ORDERED that defendant's request to strike Lawrence R. Miller, M.D. as the panel qualified medical evaluator is hereby granted. Dr. Miller's reporting and deposition transcripts are stricken from evidence as inadmissible.

IT IS FURTHER ORDERED that a replacement QME panel must issue. All other issues including the specialty of the replacement QME panel are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 22, 2021

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

**FELICIA SONNIER
KEGEL TOBIN & TRUCE
LAW OFFICES OF WILLIAM J. KROPACH**

AI/pc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS