

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. OAK 0328271**

4 **NELLY ROMERO,**

5 *Applicant,*

6 **vs.**

7 **COSTCO WHOLESALE, permissibly self-**  
8 **insured,**

9 *Defendant.*

**OPINION AND ORDER  
DENYING REMOVAL**

10  
11 Defendant seeks removal to the Appeals Board from the Order issued by the workers'  
12 compensation administrative law judge (WCJ) on October 2, 2006. In that order, the WCJ found  
13 that applicant sustained an admitted industrial injury to her neck and upper extremities while  
14 employed by defendant as a cashier during a period through September 4, 2005. In relevant part,  
15 the WCJ further found that the prior qualified medical evaluator (QME) panel, which consisted of  
16 three medical doctors and was issued by the Division of Workers' Compensation's Medical Unit  
17 (medical unit) while applicant was not represented by an attorney, has become inappropriate to  
18 resolve the parties' dispute over medical treatment recommended by applicant's treating physician  
19 because applicant, now represented by an attorney, wants to select from a new QME panel  
20 consisting of chiropractors. Accordingly, the WCJ ordered the medical unit to issue a new QME  
21 panel, comprised of three chiropractors.

22 Defendant contends that the WCJ erred in ordering a new panel to be issued and, instead,  
23 that applicant should be evaluated by the QME, Peter Salamon, M.D., an orthopedic surgeon, that  
24 defendant selected from the prior panel. Defendant argues that it properly followed the procedure  
25 set forth in Labor Code sections 4062 and 4062.1<sup>1</sup> for obtaining a panel QME while applicant was  
26 not represented by an attorney and that applicant is not entitled to a new QME panel now that she

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<sup>1</sup> All further statutory references are to the Labor Code.

1 is represented by an attorney.

2 Applicant filed an answer to defendant's petition for removal.

3 I.

4 We have considered the allegations raised in defendant's petition and applicant's answer  
5 thereto, as well as the content of the WCJ's Report and Recommendation.

6 We hold, for purposes of sections 4062.1(e) and 4062.2(e), that an employee has  
7 "received" a comprehensive medical-legal evaluation when the employee attends and participates  
8 in the medical evaluator's examination. Here, although a QME panel issued while applicant was  
9 unrepresented, and defendant selected a physician from that panel, applicant never attended and  
10 participated in an examination by that physician. Accordingly, we will deny removal and, thereby,  
11 affirm the WCJ's order for a new QME panel.

12 II.

13 The relevant facts do not appear to be disputed.

14 Applicant sustained an admitted industrial injury to her neck and upper extremities while  
15 employed by defendant as a cashier during a period through September 4, 2005, as the cumulative  
16 result of her work duties.

17 While applicant was not represented by an attorney, her treating physician issued a report  
18 recommending physical therapy, including pool therapy. Defendant objected to the requested  
19 medical treatment, pursuant to section 4062, and advised applicant in writing of the applicable  
20 procedure to resolve the dispute. When defendant did not receive a response to its objection, it  
21 requested that the medical unit issue a QME panel comprised of three medical doctors. The  
22 medical unit, on May 22, 2006, issued the QME panel.

23 Meanwhile, on May 18, 2006, applicant became represented by an attorney. The parties  
24 attempted, unsuccessfully, to select an agreed medical evaluator and, when no agreement was  
25 reached, defendant subsequently scheduled an appointment for applicant's examination by Dr.  
26 Salamon, an orthopedic surgeon it selected from the QME panel.

27 Applicant, in the interim, selected a different treating physician, a chiropractor, and

1 asserted that she is entitled to a new QME panel, compromised of chiropractors rather than  
2 orthopedic surgeons, to resolve the parties' medical treatment dispute. When the medical unit  
3 declined to issue a new panel as requested by applicant, she petitioned the Appeals Board for  
4 permission to obtain a new panel. The WCJ, subsequently, issued the disputed October 2, 2006,  
5 Order requiring the medical unit to issue a new QME panel, comprised of three chiropractors.

6 III.

7 Section 4062, subdivision (a), provides, in relevant part:

8 "If either the employee or employer objects to a medical  
9 determination made by the treating physician ... the objecting party  
10 shall notify the other party in writing of the objection within 20  
11 days of receipt of the report if the employee is represented by an  
12 attorney or within 30 days of receipt of the report if the employee  
13 is not represented by an attorney. ... If the employee is represented  
14 by an attorney, a medical evaluation to determine the disputed  
15 medical issue shall be obtained as provided in Section 4062.2, and  
16 no other medical evaluation shall be obtained. If the employee is  
not represented by an attorney, the employer shall immediately  
provide the employee with a form prescribed by the medical  
director with which to request assignment of a panel of three  
qualified medical evaluators, the evaluation shall be obtained as  
provided in Section 4062.1 and no other medical evaluation shall  
be obtained."

17 In turn, section 4062.1 provides, in relevant part:

18 "(a) If an employee is not represented by an attorney, the  
19 employer shall not seek agreement with the employee on an agreed  
20 medical evaluator, nor shall an agreed medical evaluator prepare  
the formal medical evaluation on any issues in dispute.

21 "(b) If either party requests a medical evaluation pursuant to  
22 Section 4060, 4061, or 4062, either party may submit the form  
23 prescribed by the administrative director requesting the medical  
24 director to assign a panel of three qualified medical evaluators in  
25 accordance with Section 139.2. However, the employer may not  
26 submit the form unless the employee has not submitted the form  
within 10 days after the employer has furnished the form to the  
employee and requested the employee to submit the form. The  
party submitting the request form shall designate the specialty of  
the physicians that will be assigned to the panel.

1 “(c) Within 10 days of the issuance of a panel of qualified medical  
2 evaluators, the employee shall select a physician from the panel to  
3 prepare a medical evaluation, the employee shall schedule the  
4 appointment, and the employee shall inform the employer of the  
5 selection and the appointment. If the employee does not inform  
6 the employer of the selection within 10 days of the assignment of a  
7 panel of qualified medical evaluators, then the employer may  
8 select the physician from the panel to prepare a medical evaluation.  
9 ...

10 “(d) The evaluator shall give the employee, at the appointment, a  
11 brief opportunity to ask questions concerning the evaluation  
12 process and the evaluator’s background. The unrepresented  
13 employee shall then participate in the evaluation as requested by  
14 the evaluator unless the employee has good cause to discontinue  
15 the evaluation. For purposes of this subdivision, “good cause”  
16 shall include evidence that the evaluator is biased against the  
17 employee because of his or her race, sex, national origin, religion,  
18 or sexual preference or evidence that the evaluator has requested  
19 the employee to submit to an unnecessary medical examination or  
20 procedure. If the unrepresented employee declines to proceed with  
21 the evaluation, he or she shall have the right to a new panel of  
22 three qualified medial evaluators from which to select one to  
23 prepare a comprehensive medical evaluation. If the appeals board  
24 subsequently determines that the employee did not have good  
25 cause to not proceed with the evaluation, the cost of the evaluation  
26 shall be deducted from any award the employee obtains.  
27

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

Furthermore, section 4062.2 provides, 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 January 1, 2005, and the employee is  
represented by an attorney, the evaluation shall be obtained only as  
provided in this section.

“(b) If either party requests a medical evaluation pursuant to  
Section 4060, 4061, or 4062, either party may commence the  
selection process for an agreed medical evaluator by making a  
written request naming at least one proposed physician to be the  
evaluator. The parties shall seek agreement with the other party on  
the physician, who need not be a qualified medical evaluator, to  
prepare a report resolving the disputed issue. If no agreement is

1 reached within 10 days of the first written proposal that names a  
2 proposed agreed medical evaluator, or any additional time not to  
3 exceed 20 days agreed to by the parties, either party may request  
4 the assignment of a three-member panel of qualified medical  
5 evaluators to conduct a comprehensive medical evaluation. ...

6 [¶] ... [¶]

7 “(e) If an employee has received a comprehensive medical-legal  
8 evaluation under this section, and he or she later ceases to be  
9 represented, he or she shall not be entitled to an additional  
10 evaluation.”

11 Therefore, section 4062.1 controls the procedure by which the parties may obtain a medical  
12 evaluation to address a disputed issue pursuant to sections 4060, 4061, or 4062 when the employee  
13 is not represented by an attorney, and section 4062.2 controls the procedure, for injuries and  
14 alleged injuries occurring on or after January 1, 2005, when the employee is represented by an  
15 attorney. Pursuant to subdivision (e) of those sections, an additional evaluation may not be  
16 obtained when the employee either changes from being unrepresented by an attorney to being  
17 represented or ceases being represented after previously having an attorney where the “employee  
18 has *received* a comprehensive medical-legal evaluation” under either 4062.1 or 4062.2. (Emphasis  
19 added.) We conclude that a comprehensive medical-legal evaluation is “received” when the  
20 employee attends and participates in the medical evaluator’s examination.

21 Here, while applicant was unrepresented, defendant objected to her treating physician’s  
22 recommendation for physical therapy and advised applicant in writing of the applicable procedure  
23 to resolve the dispute. When defendant did not receive a response to its objection from applicant,  
24 it requested and obtained from the administrative director a QME panel of medical doctors on May  
25 22, 2006, pursuant to section 4062.1.

26 In the meantime, on May 18, 2006, applicant became represented by an attorney. The  
27 parties attempted, unsuccessfully, to select an agreed medical evaluator and, when no agreement  
was reached, defendant subsequently scheduled an appointment for applicant’s examination by Dr.  
Salamon, an orthopedic surgeon it selected from the QME panel. However, because applicant had  
not attended and participated in the examination by the panel QME when she changed from being

1 not represented by an attorney to being represented, she had not “received” a comprehensive  
2 medical-legal evaluation pursuant to section 4062.1 and is, therefore, not precluded from  
3 requesting a new QME panel pursuant to section 4062.2.

4 Therefore, the WCJ did not err in ordering the medical unit to issue a new QME panel  
5 consisting of chiropractors, the specialty designated by applicant as the party submitting the  
6 request for the panel, pursuant to section 4062.2. Accordingly, we will deny removal.

7 For the foregoing reasons,

8 **IT IS ORDERED** that removal from the Order of October 2, 2006, is **DENIED**.

9 ***WORKERS' COMPENSATION APPEALS BOARD***

10  
11 */s/ R. G. Caplane*

12  
13 ***I CONCUR,***

14  
15 */s/ Janice Jamison Murray*

16  
17  
18 */s/ Joseph M. Miller*

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

20 ***6/14/2007***

21 ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN BELOW:***

22 ***JONATHAN BRAND, 1777 BOTELHO DR., #220, WALNUT CREEK, CA 94596***

23 ***MULLEN & FILIPPI, 555-12<sup>TH</sup> ST., #2050, OAKLAND, CA 94607***

24 JSG/rrm  
25  
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