

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

3
4 **JUAN HERNANDEZ,**

5 *Applicant,*

6 **vs.**

7 **SMITH'S BAKERIES, INC.;**
8 **WILLIAMSBURG NATIONAL INSURANCE**
9 **COMPANY, administered by ILLINOIS**
10 **MIDWEST INSURANCE AGENCY, LLC,**

11 *Defendants.*

Case No. ADJ9500867
(San Francisco District Office)

ORDER DENYING
PETITION FOR REMOVAL

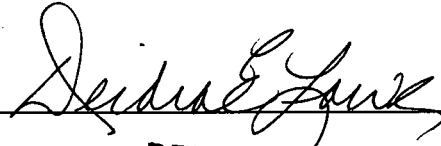
12 We have considered the allegations of the Petition for Removal and the contents of the report of
13 the workers' compensation administrative law judge with respect thereto. Based on our review of the
14 record, and for the reasons stated in said report, which we adopt and incorporate, we will deny removal.

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1 For the foregoing reasons,

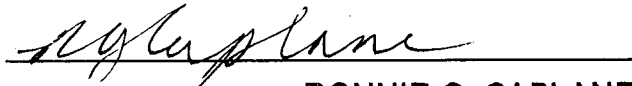
2 **IT IS ORDERED** that the Petition for Removal is **DENIED**.

3 **WORKERS' COMPENSATION APPEALS BOARD**

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6 DEIDRA E. LOWE

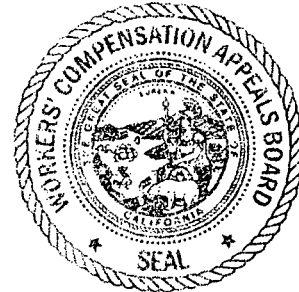
7 **I CONCUR,**

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11 RONNIE G. CAPLANE

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14 FRANK M. BRASS



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

17
18 **FEB 04 2015**

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

21 **BRADFORD & BARTHEL**
22 **BRIDGES LAW FIRM**
23 **EDD SDI**
24 **ILLINOIS MIDWEST INSURANCE AGENCY**
25 **JUAN HERNANDEZ**



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27 **mm**

HERNANDEZ, Juan

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5 Attorneys for Defendants
6 Illinois Midwest Insurance Agency, LLC on behalf of Williamsburg National
Insurance Company
7

8 **WORKERS' COMPENSATION APPEALS BOARD**

9 **STATE OF CALIFORNIA**

10 JUAN HERNANDEZ,

Case No. ADJ9500867

11 Applicant,

12 vs.

**ANSWER TO APPLICANT'S PETITION
FOR REMOVAL**

13 SMITH'S BAKERIES, INC. and ILLINOIS
MIDWEST INSURANCE AGENCY, LLC
ON BEHALF OF WILLIAMSBURG
14 NATIONAL INSURANCE COMPANY,

15 Defendants.

16 COMES NOW, defendants, Illinois Midwest Insurance Agency, LLC on behalf of
17 Williamsburg National Insurance Company (defendant), by and through their attorneys of
18 record, the Law Offices of Bradford and Barthel, and hereby respectfully submits this Answer
19 to Applicant's Petition for Removal.

20 **STATEMENT OF FACTS**

21 Applicant Juan Hernandez while employed as a maintenance worker by Smith's
22 Bakeries Incorporated alleges an injury beginning January 7, 2012 through September 27,
23 2013, to his right shoulder, right wrist, and back arising out of and occurring in the course of
24 his employment. (Minutes of Hearing (MOH), 10/10/2014, p. 2).

25 Applicant began treating with Dr. Catalino Dureza. Defendant notified applicant on
26 March 21, 2014 that it was delaying benefits due to a need for additional information
27 regarding the claim. (03/21/2014 Delay Notice [Defense Ex. B admitted on 10/10/2014]). On
28 April 30, 2014, defendant requested a panel QME in orthopedic surgery. (04/30/2014 Defense

1 Letter to Medical Unit [Defense Ex. C admitted on 10/10/2014]). Attached to that letter was a
2 letter from defense counsel dated April 14, 2014 wherein defendant objected to Dr. Dureza's
3 February 5, 2014 report and specifically objected to his diagnosis, objective findings,
4 treatment, work status, and impairment, among other things. (Id.). The attached QME form
5 106, indicated a request for a Labor Code section 4062¹ evaluation. (Ibid.).

6 Defendant denied applicant's claim on May 15, 2014. The basis of the denial is a lack
7 of supporting medical evidence of injury AOE/COE. (05/15/2014 Denial of Claim of
8 Defendant [Applicant Ex. 1 admitted on 10/10/2014]).

9 On May 21, 2014, the Medical Unit issued a panel list of orthopedic surgeons in
10 response to defendant's request. (05/21/2014 Panel List of Orthopedic Surgeons [Defense Ex.
11 D admitted on 10/10/2014]). In response thereto, defendant notified applicant of its strike of
12 one of the surgeons on the list on May 30, 2014. (05/30/2014 Defendant's Strike of Panel List
13 [Defense Ex. E admitted on 10/10/2014]).

14 On June 17, 2014, applicant's counsel wrote to the Medical Unit objecting to the panel
15 QME specialty requested by defendant. (06/17/2014 Correspondence from Applicant's
16 Attorney [Applicant Ex. 2 admitted on 10/10/2014]). Instead, applicant's counsel proposed
17 neurosurgery as the appropriate specialty. (Ibid.). Applicant's counsel did not strike a
18 physician from the list issued by the Medical Unit. As a result, on July 8, 2014, defendant
19 selected a physician from the list and set an appointment with Dr. Ernest Miller. (07/08/2014
20 Defense Counsel Letter [Defense Ex. G admitted on 10/10/2014]; 07/10/2014 Defense
21 Counsel Correspondence [Defense Ex. H admitted on 10/10/2014]).

22 As a result of the specialty dispute, applicant filed a Declaration of Readiness to
23 Proceed and a Priority Conference was held on July 29, 2014, before Worker's Compensation
24 Judge (WCJ) Terri Gordon. The hearing was taken off calendar based on, per the Minutes of
25 Hearing, a resolution by agreement of the parties. In the comments section it was noted that
26 "PQME eval with Dr. Miller will take place on 8/28/14."

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¹ All further statutory references are to the Labor Code, except where otherwise noted.

1 On August 6, 2014, defendant sent applicant's counsel a proposed cover letter to Dr.
2 Miller specifically referencing the August 28, 2014 appointment. (08/06/2014
3 Correspondence from Defendant [Defense Ex. J admitted on 10/10/2014]). The next day, on
4 August 7, 2014, applicant's counsel wrote to defendant objecting to the reporting of Dr.
5 Dureza referencing sections 4060, 4061, and 4062. (08/07/2014 Correspondence from
6 Applicant Attorney [Defense Ex. K admitted on 10/10/2014]). Applicant's counsel offered
7 various candidates as an AME and noted that if no agreement was reached within 15 days a
8 panel QME would be requested. (Ibid.).

9 Dr. Avrum Gratch, Associate Medical Director with the Medical Unit, responded to
10 applicant's objection on August 12, 2014. (08/12/2014 Correspondence from the Medical
11 Unit [Defense Ex. L admitted on 10/10/2014]). In Dr. Gratch's opinion, orthopedic surgery
12 was the appropriate specialty. (Ibid.).

13 On August 26, 2014, Applicant's counsel wrote to defendant and claimed that
14 applicant never agreed to use Dr. Miller as a panel QME or AME and requested that the
15 appointment be canceled. (08/26/2014 Correspondence from Defense Counsel [Defense Ex. N
16 admitted on 10/10/2014]).

17 Defendant issued a partial denial of the claim on September 23, 2014. In that letter,
18 defendant denied liability for the neck, right knee, right fingers, right leg, right buttocks, left
19 shoulder, psyche, and chest. (09/23/2014 Correspondence from Defendant [Defense Ex. P
20 admitted on 10/10/2014]).

21 Due to applicant's failure and refusal to attend the evaluation with Dr. Miller,
22 Defendant filed a Petition to Compel applicant's attendance at an evaluation set for November
23 20, 2014. WCJ Gordon signed an order granting the petition on September 29, 2014.

24 **PROCEDURAL HISTORY**

25 The dispute proceeded to an Expedited Hearing on October 10, 2014, before WCJ
26 Gordon. The issue for trial was whether defendant's April 30, 2014 request for a panel QME
27 was valid. (MOH, 10/10/2014, p. 2). The matter was submitted at that time.

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1 On November 7, 2011, WCJ Gordon issued her Findings and Orders and Opinion on
2 Decision. WCJ Gordon found that while defendant's request for a panel QME was not valid,
3 Dr. Miller was the proper panel QME because applicant had waived any objection based on
4 the contents of the Minutes of Hearing from the Priority Conference July 29, 2014. (Findings
5 and Orders, 11/07/2014, p. 1).

6 ARGUMENT

7 I. DR. MILLER IS THE PROPER PANEL QME IN THIS MATTER.

8 The WCJ correctly found that Dr. Miller was the proper panel QME. This is correct
9 for two reasons. First, contrary to the WCJ's reasoning, defendant's panel QME request was
10 indeed proper and valid. Second, there was indeed an agreement to proceed with the
11 evaluation with Dr. Miller on August 28, 2014.

12 Although applicant's claim had not yet been accepted at the time defendant issued the
13 panel QME request, it had not yet denied the claim either. On April 14, 2014, defendant
14 objected to Dr. Dureza's February 5, 2014 report and specifically objected to his diagnosis,
15 objective findings, treatment, work status, and impairment, among other things. (04/30/2014
16 Defense Letter to Medical Unit [Defense Ex. C admitted on 10/10/2014]). Defendant issued
17 its panel request on April 30, 2014. (Id.). Defendant did not deny the claim until May 15,
18 2014. (05/15/2014 Denial of Claim of Defendant [Applicant Ex. 1 admitted on 10/10/2014]).
19 But more importantly, the letter to the Medical Unit also put the parties as well as the Medical
20 Unit on notice that compensability was pending.

21 While the QME form 106 indicated a request for a section 4062 evaluation (04/30/2014
22 Defense Letter to Medical Unit [Defense Ex. C admitted on 10/10/2014]), the claim had not
23 yet been denied. Defendant still had the right to control medical treatment at that time and
24 thus a request for a panel QME to address all issues, including medical issues, under section
25 4062 was proper. Regardless of which statute the request is made under, section 4062.3 makes
26 it clear that "the medical evaluation shall address all contested medical issues arising from all
27 injuries reported." (Lab. Code § 4062.3(j)). Any evaluation would have to address the
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1 threshold issue of causation. Defendant is unaware of any authority supporting the position
2 that a denial vitiates a panel QME request made under section 4062.

3 Even if the panel request was not valid, the parties agreed to take the Priority
4 Conference from July off calendar after reaching an agreement. That agreement was spelled
5 out in the Minutes of Hearing. (MOH, 7/29/14). One of the terms of that agreement was that
6 the evaluation with Dr. Miller would go forward as scheduled. Thus, regardless of one's
7 opinion as to the validity of the request, the evaluation with Dr. Miller should have gone
8 forward. Applicant has failed to demonstrate any good faith reason as to why it should not.

9 Applicant's contention that he was denied due process because this issue was
10 supposedly not raised at trial is specious and intellectually disingenuous. Although the issue
11 was whether there was a valid panel request, nothing in the stipulations set forth by the WCJ
12 prohibited her from addressing the impact of the July 29, 2014 agreement on the question of
13 whether the evaluation with Dr. Miller should go forward. The WCJ properly decided the
14 evaluation should go forward and that decision should be upheld.

15 **II. APPLICANT'S PETITION SHOULD BE DISMISSED FOR FAILURE TO**
16 **COMPLY WITH CALIFORNIA CODE OF REGULATIONS, TITLE 8,**
SECTION 10842.

17 Applicant's Petition for Removal should be dismissed for its failure to comply with
18 Title 8, California Code of Regulations, section 10842. Applicant's statement of facts is far
19 from a fair statement as required by Regulation 10842(a). Applicant's petition fails to set forth
20 all of the material evidence.

21 Rule 10846 authorizes the Appeals Board to deny or dismiss a Petition for
22 Reconsideration "if it is unsupported by specific references to the record and to the principles
23 of law involved." (Cal. Code Regs., tit. 8, § 10846). Although the record here is not
24 voluminous, it is essential that a party follow this rule and give full citations to the record, to
25 ease the WCAB's burden in finding the documents cited. Applicant's argument also fails to
26 make any reference to any significant legal authority. With the exception of one case that is
27 not directly on point with the issue he raises, his entire argument is completely devoid of any
28 statutory or case law authority whatsoever. (Petition for Removal, pp. 3-5). A party

1 complaining of a particular judgment must provide argument and legal authority for the
2 positions taken. “When an appellant fails to raise a point, or asserts it but fails to support it
3 with reasoned argument and citations to authority, we treat the point as waived.” (*Nelson v.*
4 *Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 [91 Cal.Rptr.3d 726]). A
5 reviewing court is “not bound to develop appellants’ arguments for them. [Citation.] The
6 absence of cogent legal argument or citation to authority allows this court to treat the
7 contention as waived.” (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830
8 [79 Cal.Rptr.3d 588]; *see also Associated Builders & Contractors, Inc. v. San Francisco*
9 *Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2 [87 Cal.Rptr.2d 654, 981 P.2d 499]; *People v.*
10 *Stanley* (1995) 10 Cal.4th 764, 793 [42 Cal.Rptr.2d 543, 897 P.2d 481]). By virtue of
11 applicant’s failure to cite to any legal authority, he has waived his right to complain of the
12 decision.

13 Finally, failure to comply with the Rule 10842 is similar to a failure to comply with
14 California Rule of Court 8.495, when filing a Petition for Writ of Review. In *Nielsen v*
15 *Workers’ Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923, 50 Cal.Comp.Cases 104, the
16 Court, ruling on California Rule of Court 57(a) (an earlier version of rule 8.495), noted the
17 petitioning party was required to fairly state all the material facts, and if not done, a writ
18 should not even issue. The court went even further in *Western Aggregates Inc. v. County of*
19 *Yuba* (2002) 101 Cal.App.4th 278, 290–291, 130 Cal.Rptr.2d 436, stating that a lack of a fair
20 statement of facts forfeits evidentiary claims, and “appellate counsel should be vigilant in
21 providing us with effective assistance in ferreting out all the operative facts.”

22 Here, applicant provides no citation to the evidentiary record as required by Rule
23 10842. If it is applicant’s contention that there is insufficient evidence to support the WCJ’s
24 finding, applicant fails to provide any recitation to the record or citation to authority to support
25 that contention. Given the lack of a fair statement of facts that is based on the entire record
26 and admitted evidence the Board should deny the petition in keeping with the above noted
27 regulation. Based on the above violations, applicant’s petition should be dismissed.

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1 **III. THE PETITION SHOULD BE DISMISSED FOR FAILURE TO ESTABLISH**
2 **THE REQUISITE ELEMENTS FOR REMOVAL – IRREPARABLE HARM OR**
3 **SIGNIFICANT PREJUDICE.**

4 It is well known that removal is an extraordinary remedy. To make such a claim, the
5 petitioning party must establish two threshold requirements: irreparable harm or significant
6 prejudice and that reconsideration is not an adequate remedy. Applicant has failed to do that
7 entirely.

8 The Board may exercise the power of removal, pursuant to section 5310, to remove a
9 case to itself where a party demonstrates that it will suffer irreparable harm or significant
10 prejudice without review before a final order. Title 8, California Code of Regulations, section
11 10843(a)(1) and (2) allows for removal if an order, decision, or action will result in significant
12 prejudice or irreparable harm. A petitioner must also demonstrate that reconsideration will not
13 be an adequate remedy after the issuance of a final order, decision or award. (Tit. 8, CCR §
14 10843(a)). Removal, rather than reconsideration, is the appropriate remedy under section 5310
15 for interim, non-final orders. Removal is an extraordinary remedy, however, which will not be
16 granted absent a showing that substantial prejudice or irreparable harm will result if removal is
17 not granted. (*Castro v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1460 (writ
18 denied); *Bulmer v. Circle K Corp.* (SAC 93830, Apr. 30. 1986) 14 Cal.Workers'Comp.Rptr.
19 160 (WCAB panel); *Swedlow v. Workers' Comp. Appeals Bd.* (1983) (*Smith*) 48
20 Cal.Comp.Cases 476 (writ denied); Cal.CodeRegs., tit.8, § 10843).

21 Applicant's petition makes no reference whatsoever to these requirements. Applicant
22 has failed to demonstrate how the judge's decision irreparably harms him or causes him
23 significant prejudice by going to a panel QME in a specialty that has already been deemed
24 proper by the Medical Unit. Applicant has similarly failed to demonstrate how reconsideration
25 would not be an adequate remedy. For those reasons, applicant's petition should be denied.

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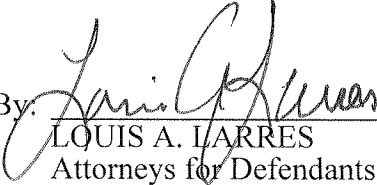
CONCLUSION

Based on the above, defendant respectfully requests that removal be denied and that the parties be allowed to proceed to an evaluation with Dr. Miller as the panel QME.

Dated: December 5, 2014

Respectfully submitted,

Bradford & Barthel, LLP

By: 

LOUIS A. LARRES
Attorneys for Defendants

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VERIFICATION

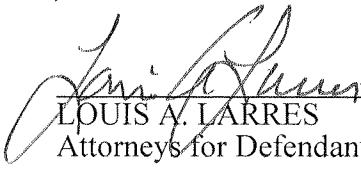
STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I have read the foregoing ANSWER TO APPLICANT’S PETITION FOR REMOVAL and know its contents.

I am an attorney for a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I am informed and believe that they are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 5, 2014, at Fresno, California.



LOUIS A. LARRES
Attorneys for Defendants

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Asheley Alexander
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3 (559) 442-3602

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5 **PROOF OF SERVICE**
(C.C.P Section 1013a, 2015.5)

6 STATE OF CALIFORNIA)
7) ss.
8 COUNTY OF FRESNO)

9 **RE: JUAN HERNANDEZ VS. SMITH'S BAKERIES, INC.**
10 **Claim No.: 0249488-WCMWIL**
Our File No.: 0270.063992

11 I, David Tringali, am a citizen of the United States and am employed in the county of
12 the aforesaid; I am over the age of 18 years and not a party to the within action; my business
13 address is 1300 East Shaw Avenue, Suite 171, Fresno, California 93710.

14 On December 5, 2014, I served the within document(s) described as:

15 **ANSWER TO APPLICANT'S PETITION FOR REMOVAL**

16 on the interested parties in this action as stated on the attached mailing list.

17 (ORIGINAL) Filed Electronically via EAMS.

18 (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope
19 addressed as set forth on the attached mailing list. I placed each such envelope for
20 collection and mailing following ordinary business practices. I am readily familiar
21 with this Firm's practice for collection and processing of correspondence for mailing.
22 Under that practice, the correspondence would be deposited with the United States
Postal Service on that same day, with postage thereon fully prepaid at Fresno,
California, in the ordinary course of business. I am aware that on motion of the party
served, service is presumed invalid if postal cancellation date or postage meter date is
more than one day after date of deposit for mailing in affidavit.

23 I, the undersigned, declare under penalty of perjury that the foregoing is true and correct.

24 Executed on December 5, 2014, at Fresno, California

25 David Tringali
26 (Type or print name)


(Signature)

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