WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BASHAR ZEIDAN, ***Applicant***

vs.

CITY OF RICHMOND;
ACCLAMATION INSURANCE MANAGEMENT SERVICES ***Defendants***

Adjudication Number: ADJ15599962
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings of Fact dated April 21, 2022, the Workers' Compensation Administrative Law Judge ("WCJ") found that applicant, while employed as a police officer by the City of Richmond ("defendant") on June 10, 2017, sustained industrial injury to his neck and low back, and that applicant claims injury to his hips. The WCJ also found that defendant waived the argument that the Independent Medical Evaluation ("IME") process described in the Alternative Dispute Resolution ("ADR") agreement controls the medical-legal process herein, and that special circumstances exist that render it unjust to enforce the provisions of the ADR contract regarding the usage of IMEs.

Defendant filed a timely Petition for Removal in response to the WCJ's decision. Defendant contends that the evidence does not justify the WCJ's conclusion that defendant abandoned the use of IMEs, that removal is justified because defendant has obtained new evidence that was not available at the time of trial, that the Appeals Board should enforce the ADR system as a matter of public policy, that reconsideration is an inadequate remedy, and that defendant will incur significant prejudice or irreparable harm by reason of the WCJ's decision.

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[1] Commissioner Katherine Williams Dodd signed the Opinion and Order Granting Petition for Reconsideration dated July 13, 2022. Commissioner Dodd is not available to participate in this matter. A new panel member has been substituted in her place.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we are persuaded that the preponderance of evidence justifies a finding that the parties must continue using IMEs pursuant to the ADR agreement. We are further persuaded that significant prejudice will result if the WCJ's decision stands, and that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, § 10955.) Therefore, we will grant removal and affirm the WCJ's decision in part (on injury) and amend it in part, to reflect our determination that the parties must continue using IMEs pursuant to the ADR agreement.

At the outset, we observe that 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, injury arising out of and in the course of employment, 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 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 petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, the Findings of Fact dated April 21, 2022 is a hybrid decision because it includes a final finding on the issue of industrial injury, but it also includes findings that are interlocutory in nature because they pertain to medical-legal procedure. We accept defendant's petition for removal as a petition for reconsideration because the WCJ included a finding of injury,

which is a final resolution of a threshold issue. However, defendant's petition challenges the WCJ's interlocutory finding that special circumstances exist that render it unjust to enforce the provisions of the ADR contract regarding the usage of IMEs. Therefore, we will evaluate the issues raised by defendant's petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm.

FACTUAL BACKGROUND

The following portions of the WCJ's Opinion on Decision provide a detailed overview of the relevant factual background:

> On June 10, 2017, applicant sustained an injury to his low back and neck while employed by defendant as a police officer.
>
> Before applicant's injury, The City of Richmond and the Richmond Police Officers Association entered into a Workers' Compensation Alternative Dispute Prevention and Resolution Program (ADR) Agreement pursuant to Labor Code Section 3201.71. (Exhibit Q, ADR Agreement.) As relevant herein, the ADR contract provided that, the ADR program was intended in part to "eliminate and reduce the waste, excessive costs, and delays in delivering medical care historically associated with the delivery of Workers' Compensation benefits." (*Id.* at p. 2.) It further provided in relevant part that,
>
> > 1.1 Should this program be terminated it is the intent of the parties that those claims … with dates of injury or illness occurring during the period of the program … shall continue to be covered by the terms of this Agreement.
> >
> > (*Id*. at pp. 4-5.)
> >
> > ***
> >
> > 1.8 If any provision of this Agreement or its application is held invalid, the invalidity will not affect other provisions or applications of this Agreement that can be given without the invalid provisions or applications, and thus the provisions of this Agreement are deemed to be severable.
> >
> > (*Id.* at p. 8.)
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> > ***
> >
> > 4.1 The [Joint Committee of the employer and the union] shall establish a network of medical-legal examiners to serve as the exclusive source of comprehensive medical-legal evaluations within the jurisdiction of this program. Any issue of the appropriateness of medical treatment shall be resolved in this program and shall be submitted to the appointed medical-legal examiner. It is the party's intention to not utilize the

> independent medical review provisions of Labor Code section 4616.4 and the regulations thereunder.
>
> The injured employee and the City of Richmond may each schedule an appointment with a medical-legal examiner in any medical specialty relevant to the case in dispute. Absent good cause to the contrary, the injured employee shall be entitled to one examination with a medical-legal examiner in each relevant specialty. Any dispute regarding whether a report in any particular medical specialty is relevant shall be submitted to mediation and, if necessary, arbitration. The Ombudsperson shall also have the authority to schedule a medical-legal exam if necessary to move the case toward resolution or it is found to be in the best interests of the program. The selected medical-legal examiner in each case has the authority to resolve any question that requires independent medical-legal review.
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> (*Id*. at pp. 17-18.)

The agreement also included other provisions, including that all disputes would be resolved by an Ombudsperson, the ADR Director/Mediator, Arbitration, and Petitions for Reconsideration. (*Id*. at pp. 8-9.) It further provided that any application filed with the WCAB for a date of injury occurring after the effective date of the ADR program would immediately be dismissed. (*Id*. at p. 12.)

Applicant selected Dr. Eduardo Lin to act as the PIME, and Dr. Lin issued multiple reports in that capacity. (Exhibits I through O, Reports of Eduardo Lin, M.D., various.) Defendant selected Dr. Robert Henrichsen to act as the DIME, and Dr. Henrichsen issued multiple reports. (Exhibits D through F, Reports of Robert Henrichsen, M.D., various.)

On November 5, 2021, the claims adjuster, Tamala Palmer, sent a letter to applicant's attorney stating in relevant part that,

> By joint agreement ... the jurisdiction of the ADR to adjudicate these claims is relinquished effective April 17, 2021.
>
> Under the ADR agreement, all medical care was required to be sought within the ADR's Exclusive Medical Provider List. As of April 17, 2021, this requirement will no longer be in effect …
>
> The City of Richmond and the RPOA will acknowledge the jurisdiction of the Workers' Compensation Appeals Board to litigate any unresolved issues.
>
> (Exhibit R, Notice of End of ADR Agreement.)

Between April 17, 2021 and November 5, 2021, applicant had obtained a supplemental report from Dr. Lin and set his deposition. (Exhibit H, Invoice, May 15, 2021; Exhibit I, Report of Eduardo Lin, July 14, 2021; Exhibit S, Medical Cover Letter, July 13, 2021, Exhibit T, Notice of Deposition, April 26, 2021.)

Thereafter, on January 21, 2022, applicant issued a letter objecting to his treating physician's reports. (Exhibit U, Objection Letter, January 21, 2022.)

On February 7, 2022, the matter proceeded to hearing and was set for trial. (Pre-Trial Conference Statement (PTCS).) On that same date, defendant obtained a panel of qualified medical evaluators from the medical unit. (Exhibit 2.)

On March 15, 2022, the matter proceeded to trial on the sole issue of whether the parties were obligated to continue obtaining reports from their IMEs or if they were required to obtain a QME in accordance with section 4062.2.

Applicant called Tamala Palmer as a witness, and as relevant herein, she testified that: She began handling claims for defendant on April 19, 2021, a few days after the carve out program ended. She is not that familiar with the carve out program. She believes that after April 17, 2021, the Independent Medical Review (IMR) process governs any medical dispute that may arise. She sent letters to unrepresented injured workers with dates of injury after April 17, 2021 advising them that the ADR program was no longer in effect, that they had to obtain QMEs, and that they could not return to their IMEs. Exhibit 1 is an example of such a letter. She did not recall sending that letter to represented injured workers. Upon review of Exhibit R, she recalled a letter sent to applicant advising him that jurisdiction over his claim had transferred to the WCAB. An unrepresented injured worker with an older injury who had already been evaluated by IMEs pursuant to the ADR contract would be instructed to obtain a QME. It is possible that an employee with injury after April 17, 2021 would not know about the end of the ADR program until November. She did not send letters to represented injured workers instructing them to obtain QMEs because she assumed that attorneys would work out the medical-legal procedure.

Applicant's exhibits included a letter that Ms. Palmer sent in 2021 to an unknown party regarding an unknown claim stating that,

> the scheduled appointment with an Independent Medical Evaluator has been cancelled. …
>
> As the Alternate Dispute Resolution Program no longer exists, you have the option to request an examination with a Qualified Medical Examiner (QME) to be selected from a panel that will be provided by the Division of Workers' Compensation….

> If you fail to request the QME panel within 10 days, we will file the request for the QME panel on your behalf.
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> (Exhibit 1, Letter from City of Richmond.)

DISCUSSION

We agree with the first part of the "Discussion" section of the WCJ's Opinion on Decision, wherein the WCJ states that the WCAB is tasked with interpreting the contract between applicant's union and defendant City of Richmond, and that generally, stipulations are binding on the parties in workers' compensation matters. In her Opinion on Decision, the WCJ continues with the following analysis:

> Here, the City and the union for its police officers stipulated to engage in an ADR program. (Exhibit Q.) The contract specifically provided that if the ADR program terminated, claims for dates of injury while the program was in effect would continue to be covered by the terms of the agreement. (*Id*. at pp. 4-5.) The contract further stated that if any of its provisions were found to be invalid, its other provisions would not also be found invalid. (*Id.* at p. 8.) Moreover, Paragraph 4.1 of the contract provided in relevant part that any disputes over medical treatment would be submitted to an appointed medical legal evaluator and that injured employees and the City would each have the right to obtain their own medical-legal evaluators. (*Id.* at pp. 17-18.) *These terms all suggest that the parties in this matter are obligated to continue relying upon their IMEs* despite the fact that other provisions of the contract, such as the mandated use of an ombudsperson or dismissal of an application filed with the WCAB, were invalidated as they were no longer in effect. [Italics added.]
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> However, on November 5, 2021, defendant notified applicant that the jurisdiction over his claim had been transferred to the WCAB. (Exhibit R.) […]

We note that because defendant is the party seeking removal in this matter, defendant evidently believes that continuing with IMEs as prescribed in the ADR agreement is in its interest. Therefore, it is apparent that defendant has the burden of proving that the parties should continue using IMEs pursuant to the ADR agreement. (See, e.g., *Kulish v. Orchards* (2008) 2008 Cal. Wrk. Comp. P.D. LEXIS 84 at p. *4, citing Lab. Code, § 5705 [Employer bears burden of proof on apportionment because employer benefits from it.].) Here, concerning the issue of whether the parties must continue with IMEs, the standard of proof is the preponderance of evidence standard. (Lab. Code, § 3202.5.) However, we are not persuaded that the preponderance of evidence justifies the WCJ's findings that defendant waived continued usage of IMEs and that it would be unjust to enforce the ADR as it pertains to the usage of IMEs.

We further note that Exhibit R (defendant's Notice to applicant Ending ADR Agreement), which the WCJ cites in support of her decision, only states that the requirement under the ADR agreement - that all medical care must be sought within the ADR's Exclusive Medical Provider List - is no longer in effect. Exhibit R is silent as to whether or not the parties must continue using their IMEs, as opposed to starting over again with Qualified Medical Evaluators ("QMEs").

However, the WCJ also cites Exhibit 1 in support of her decision. Exhibit 1 is a letter dating back to 2021 that defendant's claims adjuster, Ms. Palmer, sent to an unknown party regarding an unknown claim stating that "the scheduled appointment with an [IME per the ADR agreement] has been cancelled," and that because the ADR program "no longer exists, you have the option to request an examination with a Qualified Medical Examiner (QME) to be selected from a panel that will be provided by the Division of Workers' Compensation." In other words, defendant attempted to stop the unknown claimant from proceeding with an IME under the ADR agreement and to steer the unknown claimant into the medical-legal process mandated by the Labor Code, within the jurisdiction of the WCAB.

In reference to Exhibit 1, defendant's claims adjuster, Ms. Palmer, testified at trial on March 15, 2022 as follows:

> She began handling claims for the City of Richmond on April 19th, 2021. This was shortly after the carve-out program ended on April 17, 2021. She is not that familiar with the terms of the carve out agreement. She would guess that IMR applies to 25 cases with dates of injury after April 17th, 2021. After April 17th, 2021, the IMR process would apply.
>
> On November 5th, 2021 she sent out notice that the ADR program was no longer in effect, and that the QME and IMR process would be followed. This letter was sent to pro per applicants with dates of injury occurring after April 17th, 2021.
>
> She does not recall sending a letter to applicant dated November 5th, 2021, regarding transfer of his case to the WCAB. Upon review of Exhibit R, her memory was refreshed, and yes, Exhibit R was sent to applicant. However, she personally did not send it out. She remembers that letters were sent out but did not read them clearly. She was most focused on cases involving pro per injured workers. If letters went out, they went out.
>
> It was her understanding that the attorneys in represented cases would work out whether the QME or IME process applied. *This was her assumption and she was not given this information by anyone in particular*. The defense attorney is responsible for discussing procedure with the applicant's attorney. [Italics added.]
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> ***

> She sent out letters such as the one filed as Exhibit 1. Those letters were sent to injured workers telling them to go through the QME process. She does not recall sending out such a letter on a case where the applicant was represented. She only recalls sending these letters out to pro per applicants.
>
> ***
>
> If there is an unrepresented injured worker, the QME process should occur as described in the Labor Code. The WCAB has the jurisdiction to determine whether the IME process or the QME process controls.

In her Opinion on Decision, the WCJ discusses Exhibit 1 and Ms. Palmer's testimony as follows:

> […] [T]he focus should be on defendant's treatment of unrepresented injured workers and medical treatment disputes that arise after April 17, 2021. Ms. Palmer testified that unrepresented injured workers who had already been evaluated by dueling IMEs were required to be evaluated by a panel qualified medical evaluator, and this testimony is supported by applicant's Exhibit 1. Defendant has offered no evidence reflecting why an unrepresented injured worker's claim would be governed by the QME process, but a represented injured worker's claim would not be so governed. Instead, Ms. Palmer only testified that she believed the attorneys would resolve the dispute. Further, the ADR contract does not mandate treating an unrepresented employee differently than a represented one, and in fact, it permitted both types of employees to obtain their own evaluators.
>
> Moreover, Ms. Palmer's testimony regarding how defendant is handling medical treatment disputes that arise after April 17, 2021, also demonstrates that defendant's waiver of the provisions in paragraph 4.1 of the ADR contract. Additionally, requiring an unrepresented worker who had already been evaluated by multiple IMEs to undergo another evaluation would negate defendant's argument that the parties in this case should continue to utilize their IMEs because of the medical-legal costs that defendant has already incurred.

Although the WCJ correctly points out that defendant offered no rationale for treating represented and unrepresented injured employees differently, this issue was not before the WCJ at trial on March 15, 2022. Rather, the issue was "whether or not the parties [in this case] are to continue utilizing [the medical-legal report process of the ADR] or if they are now to utilize the procedure set forth in Labor Code section 4062.2." (Minutes of Hearing, 3/15/22, p. 2.) On that issue, we are persuaded that Paragraph 1.1 of the ADR agreement is controlling. Paragraph 1.1 clearly states: "Should this [ADR] program be terminated it is the intent of the parties that those claims…with dates of injury or illness occurring during the period of the program…shall continue to be covered by the terms of this Agreement."

In view of the specificity and clarity of Paragraph 1.1, we disagree with the WCJ that the fact that defendant offered no rationale for treating represented and unrepresented injured employees differently, establishes that defendant waived Paragraph 4.1's establishment of "a network of medical-legal examiners to serve as the exclusive source of comprehensive medical-legal evaluations within the jurisdiction of this program."

Again returning to the facts and issue presented in this case, as contrasted with defendant's alleged disparate treatment of unrepresented applicants,[2] the WCJ acknowledges in her Opinion on Decision that other facts support a finding that the parties should continue with their IMEs:

> In this matter, it is true that applicant continued to conduct discovery with his IME after the termination of the ADR agreement. (Exhibit H, Invoice, May 15, 2021; Exhibit I, Report of Eduardo Lin, July 14, 2021; Exhibit S, Medical Cover Letter, July 13, 2021, Exhibit T, Notice of Deposition, April 26, 2021.) […]

In light of the overall record as described above, we are persuaded that the preponderance of evidence establishes that the parties in this case must continue using IMEs as mandated by the ADR agreement. We will amend the Findings of Fact dated April 21, 2022 to rescind the WCJ's findings that that defendant waived the argument that the IME process described in the ADR agreement controls the medical-legal process herein, and that special circumstances exist that render it unjust to enforce the provisions of the ADR contract regarding the usage of IMEs. We will replace those findings with our findings to the contrary, and we will add our own finding that resolves the issue presented at trial, i.e., the parties shall continue using IMEs pursuant to the ADR agreement.

[2] As the issue is not before us, we express no opinion as to whether defendant's alleged disparate treatment of unrepresented injured employees is merely sharp practice or raises issues of potential liability under Labor Code section 132a.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that defendant's Petition for Removal is **GRANTED**, and that this matter is **REMOVED** to the Appeals Board.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the Findings of Fact dated April 21, 2022 are **AFFIRMED**, except that Findings 2 and 3 are **RESCINDED** and **REPLACED BY** the new Findings 2 and 3 set forth below, and a new Finding 4 is **ADDED** to said decision:

FINDINGS OF FACT

1. Applicant Bashar Zeidan, while employed on June 10, 2017 by defendant as a police officer, occupational group number 490, sustained an injury arising out of and in the course of employment to his low back and neck and claims injury to his hips.

2. Defendant has not waived the argument that the IME process described in the ADR agreement controls the medical-legal process in this matter.

3. It is not unjust, in this case, to enforce the provisions of the ADR contract regarding the usage of IMEs.

4. The parties must continue using IMEs pursuant to the ADR agreement.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings by the parties and by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 26, 2024

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

BASHAR ZEIDAN
RAINS LUCIA STERN
RTGR LAW

JTL/*ara*

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