WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EFRAIN HERNANDEZ, ***Applicant***

vs.

PACIFIC AUTO CENTER; CYPRESS INSURANCE COMPANY administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Numbers: ADJ11644994; ADJ11951700
San Bernardino District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Cost petitioner Citywide Scanning Service (cost petitioner) seeks reconsideration of the August 14, 2024, Joint Findings and Joint Order (Joint F&O) wherein the workers' compensation administrative law judge (WCJ) found in relevant part that cost petitioner is not entitled to reimbursement from defendant for copy services related to the subpoenas for the records obtained from Glendale Eye Medical, Loma Linda University Medical and Concentra Urgent Care.

Cost petitioner contends that the services provided were for the purpose of proving or disproving a contested claim; that the services were reasonable and necessary at the time they were incurred; and that there was no duplicity of services, so that it is therefore entitled to reimbursement for its copy services.

We did not receive an Answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition for Reconsideration, and the contents of the Report. Based upon our preliminary review of the record, we will grant cost petitioner's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire

record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

BACKGROUND

We will briefly review the relevant facts.

On October 30, 2018, applicant filed an Application for Adjudication (Application), claiming injury to the eye while employed on October 6, 2018, by defendant as an auto mechanic. (Case No. ADJ11644994.) On February 13, 2019, applicant filed an Application claiming cumulative injury to his back while employed from January 1, 2018 through November 7, 2018, by defendant as an auto mechanic. (Case No. ADJ11951700.)

On October 26, 2018, defendant issued a Notice of Denial of Permanent Disability Benefits for applicant's injury of October 6, 2018. (Case Number ADJ11644994).

> The determination of permanent disability is based on the evaluation of treating physician Concentra-Dr. Michael Chiang dated 10/10/18. I agree with the results of the evaluation. If you disagree with the results of the evaluation of the treating physician, you may obtain an evaluation by a Qualified Medical Evaluator (QME). You must notify me in writing of your objection to the determination of the treating physician within thirty (30) days of the date you received the treating physician's report.

(Exhibit 21, 10/26/2018.)

On November 16, 2018, defendant objected via letter to the medical reporting of treating physician Michael Chiang, M.D., stating,

> . . . this office objects to the medical opinions and or findings of Dr. Chiang outlined in his report dated 10/10/2018 with respect to, but not limited to, the issues of temporary disability, permanent disability, permanent impairment, permanent and stationary status, maximum improvement, medical treatment and entitlement to supplemental job displacement benefits . . . This office will request the Administrative Director to assign a panel Qualified Medical Evaluators to conduct a comprehensive medical evaluation pursuant to the provision of Labor Code section 4062.2(b) for ADJ11644994.

(Exhibit 20, 11/16/2018.)

On January 22, 2019, applicant filed a Notice of Dismissal of Attorney dismissing Diefer Law Riverside as his attorney of record and filed a Substitution of Attorney, substituting the Nielsen Firm Los Angeles, as his attorney of record.

On February 1, 2019, defendant issued a letter to applicant regarding an evaluation by qualified medical evaluator (QME) Ganna Breland, M.D., on February 18, 2019. (Exhibit B, 2/1/2019.)

On February 20, 2019, defendant issued a transfer of care/authorization to treat letter authorizing Gordon Booth, M.D., to treat applicant both eyes in ADJ11644994 and that ADJ11951700 is "a denied claim involving a back injury." (Exhibit C, 2/20/2019.)

On February 26, 2019, defendant issued a letter to applicant's attorney. As relevant herein, it objected pursuant to "Labor Code section 5307.9 [sic]" and Rule 9982 "to any photocopy charges incurred to obtain records served herewith." (Exhibit D, 2/26/2019.)

On March 22, 2019, defendant issued a denial of claim/benefits letter. (Exhibit 22, 3/22/2019.) The denial letter states in relevant part,

> After careful consideration of all available information, we are denying all liability for your claim of injury to your spine on or through 11/7/2018 because there is no substantial legal, medical or factual evidence to indicate that your alleged injury resulted from your employment at Pac Auto Group Inc. while insured by Cypress Insurance Company. You failed to attend a properly noticed medical evaluation we scheduled for you with Dr. Ganna Breland, M.D. on 2/18/19. Dr. Breland needed you to attend his evaluation to fully evaluate your condition. As a result of your failure to attend the appointment, BHHC ability to fully investigate your allegations has been hindered. Thus we do not have, and have been prevented from obtaining sufficient information to determine compensability of your condition.

On April 23, 2019, the PWCJ Ordered that Case No. ADJ11644994 and Case No. ADJ11951700 be consolidated with venue at the San Bernardino District Office.

From May 22, 2019 through September 5, 2019, cost petitioner issued three Subpoena Duces Tecum at the request of applicant's attorney. (Exhibits 4-6, 5/22/2019-9/5/2019.)

From June 17, 2019 through September 19, 2019, cost petitioner issued three invoices to defendant for its copy services for records from Glendale Eye Medical Group, Loma Linda University Medical Center, and Concentra Urgent Care. (Exhibits 9-11, 6/26/2019-9/19/2019.)

From July 2, 2019, through July 1, 2020, defendant issued three Explanations of Review (EORs). All of the EORs state: "At the time the expense was incurred, there was not a contested claim." (Exhibit J, K, L 7/2/2019, 10/11/2019, 7/1/2020.)

During the period from September 16, 2019 through February 8, 2021, cost petitioner sought second bill reviews. (Exhibits 14-19, 9/16/2019-2/8/2021.)

On July 25, 2019, applicant filed an Amended Application adding psyche to his October 6, 2018 specific injury claim.

On August 22, 2019, defendant objected to applicant's attorney's subpoena duces tecum for records from Berkshire Hathaway Homestate Co. (Exhibit F, 8/22/2019.)

On October 1, 2019, defendant objected to applicant's attorney's subpoena duces tecum for records from Cypress Insurance Company. (Exhibit G, 10/1/2019.)

On November 12, 2019, the parties resolved the matters by way of a Compromise & Release (C&R). As relevant herein, paragraph 6 states that "earnings at time of injury" are "in dispute." In Addendum A, defendant seeks a *Thomas* finding based on its assertion that the claim in Case No. ADJ11951700 was barred by Labor Code section 3600(a)(10).[1] (Addendum A, p. 2.) The WCJ issued an order approving the C&R, which included a *Thomas* finding with the notation that "post-term. bar back; psyche; discovery declined psyche."

On July 24, 2020, cost petitioner filed a Petition for Determination of Medical-Legal Expense Dispute (cost petition) seeking payment for its services.

On April 18, 2023, cost petitioner filed and served a Declaration of Readiness on its cost petition.

On May 16, 2023, cost petitioner filed a Notice of Representation.

On July 5, 2023, a joint request was made at a mandatory settlement conference (MSC) for a continuance, which the WCJ granted.

On March 4, 2024, cost petitioner filed a Notice of Change of Representation.

On March 7, 2024, the WCJ held a status conference and set the matter for trial.

On June 19, 2024, cost petitioner and defendant proceeded to trial. According to the Minutes of Hearing (MOH),[2] the parties agreed that applicant's counsel did not request the subpoenaed records at issue before subpoenaing them. Among the issues raised were sections 4620, 4621, and 4622. Defendant also contended that applicant's failure to request the records from defendant before subpoenaing the records "renders defendant not liable for payment to Citywide Scanning pursuant to Labor Code Section 3[*sic*]5307.9."

[1] All further statutory references are to the Labor Code unless otherwise noted.

[2] The MOH incorrectly identify defendant's attorneys as attorneys for applicant.

On August 14, 2024, the WCJ issued the Joint F&O. In her Opinion on Decision, the WCJ stated that:

> . . . At issue are three invoices issued by Citywide for records copied: 1) #18243-4 from Glendale Eye Medical Group on September 17, 2019, 2) #18243-2 from Loma Linda University Medical Center on June 24, 2019, and 3) # 18243-3 from Concentra Urgent Care on June 10, 2019. (Cost Petitioner Exhibits 11, 9, and 10.) Defendant disputes liability for these charges asserting the claim was not contested at the time the records were obtained.
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> Citywide asserts that a contested claim existed when defendant issued the October 26, 2018, letter and continued through the date of the Order Approving Compromise and Release on November 12, 2019. As the records at issue were obtained on June 10, 2019, June 24, 2019, and September 17, 2019, Citywide contends there was a contested claim when services were provided. However, no explanation is provided regarding why these records were needed to prove a contested medical dispute in this case.
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> Citywide glosses over their burden to show the copy services were reasonably and necessarily incurred for the purpose of proving or disproving the contested claim. Citywide contends applicant's attorney has discretion to obtain records by subpoena but offers no explanation regarding what disputed medical fact the records were obtained for the purpose of proving or disproving. Their argument suggests that there are no limitations for records defendant must pay for if applicant's attorney wants to subpoena them. However, Labor Code section 4620 requires that the medical-legal expense be incurred for the purpose of proving or disproving a contested claim. "The existence of contested claim involving a disputed medical fact is a necessary condition but not a sufficient one. The relevant medical-legal services must have actually occurred and be necessary to prove or dispute the disputed medical fact in the contested claim." *Ramos v. Greenfield Union Sch. Dist.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 671 (Cal. Workers' Comp. App. Bd. November 3, 2015). Accordingly, Citywide must make an offer of proof regarding the purpose of issuing the subpoena for the records.
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> Based on the evidence as a whole, the undersigned finds Citywide has failed to prove, by a preponderance of the evidence that the copying services at Glendale Eye Medical Group, Concentra Urgent Care and Loma Linda University Medical Group were done to prove or disprove a contested component of applicant's claim.
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> . . . defendant argues that they were not provided an opportunity to serve records because they were never requested by applicant's attorney. Pursuant to Labor Code section 5307.9, the new fee schedule for copying expenses 'shall not allow for payment for services provided within 30 days of a request by an injured worker or

his or her authorized representative to an employer, claims administrator, or workers' compensation insurer for copies of records in the employer's, claims administrator's, or workers' compensation insurer's possession that are relevant to the employee's claim.' Effective January 1, 2013, Senate Bill No. 863 added a fee schedule for copy expenses under Labor Code section 5307.9. Administrative Rule section 9982 states '[i]f the claims administrator fails to serve records in the employer's or insurer's possession requested by an injured worker or his or her representative within the time frames set forth in Labor Code section 5307.9, or fails to serve a copy of any subsequently-received medical report or medical-legal report within the timeframes set forth in section 10635, this schedule applies to obtaining those records.

(Opinion On Decision, 8/15/2024, pp. 1-5.)

I.

DISCUSSION

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
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> (b)
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> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 23, 2024, and 60 days from the date of transmission is November 22, 2024. This decision is issued

by or on November 22, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 23, 2024, and the case was transmitted to the Appeals Board on September 23, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 23, 2024.

II.

A lien claimant holds the burden of proof to establish all elements necessary to establish its entitlement to payment for a medical-legal expense. (See §§ 3205.5, 5705.5; *Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1115 [2012 Cal. Wrk. Comp. LEXIS 160] (Appeals Board en banc).) As we explained in our en banc decision in *Colamonico v. Secure Transportation* (2019) 84 Cal. Comp. Cases 1059 (Appeals Board en banc), section 4622 provides the framework for reimbursement of medical-legal expenses. Subsection (f) of the statute, however, specifically states that "[t]his section is not applicable unless there has been compliance with Sections 4620 and 4621." (§ 4622(f).)

Thus, a lien claimant is required to establish that: 1) a contested claim existed at the time the expenses were incurred; 2) the expenses were incurred for the purpose of proving or disproving the contested claim; and 3) the expenses were reasonable and necessary at the time were incurred. (§§4620, 4621, 4622(f); *Colamonico*, *supra*, 84 Cal.Comp.Cases 1059.)

Section 4620(a) defines a medical-legal expense as a cost or expense that a party incurs "for the purpose of proving or disproving a contested claim." (§ 4620(a).) Copy services fees are

considered medical-legal expenses under 4620(a). (*Cornejo v. Younique Cafe, Inc.* (2015) 81 Cal.Comp.Cases 48, 55 [2015 Cal. Wrk. Comp. LEXIS 160] (Appeals Board en banc); *Martinez v. Terrazas* (2013) 78 Cal.Comp.Cases 444, 449 [2013 Cal. Wrk. Comp. LEXIS 69] (Appeals Board en banc).) Lien claimant's initial burden in proving entitlement to reimbursement for medical-legal expense is to show that a "contested claim" existed at the time the service was performed.

Section 4620(b) states that: "A contested claim exists when the employer knows or reasonably should know that the employee is claiming entitlement to any benefit arising out of a claimed industrial injury and one of the following conditions exists: (1) The employer rejects liability for a claimed benefit. (2) The employer fails to accept liability for benefits after the expiration of a reasonable period of time within which to decide if it will contest the claim. (3) The employer fails to respond to a demand for payment of benefits after the expiration of any time period fixed by statute for the payment of indemnity." (Lab. Code, § 4620(b).)

The determination of whether a purported medical-legal expense involves a "contested claim" is a fact driven inquiry. The public policy favoring liberal pre-trial discovery that may reasonably lead to relevant and admissible evidence is applicable in workers' compensation cases. (*Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal. App. 4th 654, 663 [64 Cal.Comp.Cases 624].)

In the present matter, the WCJ concluded that a contested claim did not exist at the time cost petitioner performed its services. Cost petitioner asserts that the claim was contested as early as October 26, 2018, when applicant was denied permanent disability on the basis of his treating physician Dr. Chiang, and then defendant's subsequent objection to Dr. Chiang's medical opinion on November 18, 2018, wherein it stated that it would request a PQME. On March 22, 2019, defendant issued a notice denying applicant's claim for benefits for his injury on "November 7, 2018." Thus, it appears that a contested claim existed when records were subpoenaed beginning on May 22, 2019. Moreover, applicant's back injury remained disputed even at the time of the C&R. However, based on our preliminary review, further review of the record of proceedings and the evidence is necessary in order to reach our decision.

III.

Pursuant to section 5307.9,

> On or before December 31, 2013, the administrative director . . . shall adopt . . . a schedule of reasonable maximum fees payable for copy and related services, including, but not limited to, records or documents that have been reproduced or recorded in paper, electronic, film, digital, or other format. The schedule shall specify the services allowed and shall require specificity in billing for these services, and ***shall not allow for payment for services provided within 30 days of a request by an injured worker or his or her authorized representative to an employer, claims administrator, or workers' compensation insurer for copies of records in the employer's, claims administrator's, or workers' compensation insurer's possession that are relevant to the employee's claim.*** . . .

(Lab. Code, § 5307.9 [italics and bold added for emphasis].)

> AD Rule 9982(d) states in pertinent part that:
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> . . . . There will be no payment for copy and related services that are: (1) Provided within 30 days of a written request by an injured worker or his or her authorized representative to an employer to an employer, claims administrator, or workers' compensation insurer for copies of records in the employer's claims administrator's, or workers' compensation insurer's possession that are relevant to the employee's claim. . .

(Cal. Code Regs., tit. 8, § 9982(d)(1).)

Here, the parties stipulated that applicant's attorney did not request the records from applicant's employer and/or defendant prior to issuing the subpoena. Although the above statute and regulation do not allow for payment of a subpoena duces tecum served within 30 days of a request for records, *it does not state that a request for records must be requested before they can be subpoenaed.* In other words, there is no mandate or requirement that an applicant or their attorney must make a request for records from the employer or the insurer prior to requesting that a subpoena issue for records.

IV.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire

record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci*. *Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp*. *Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp*. *Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed

> by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

V.

Accordingly, we grant cost petitioner's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that cost petitioner's Petition For Reconsideration of the Joint F&O issued by the WCJ on August 15, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 22, 2024

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

KAPLAN BOLDY
CITYWIDE SCANNING

DLM/oo

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