WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ERIC VOLK, *Applicant*

vs.

LITTLE COMPANY OF MARY HOSPITAL, permissibly self-insured, administered by CORVEL CORPORATION, *Defendants*

Adjudication Numbers: ADJ10035604 ADJ10036839
Long Beach District Office

OPINION AND ORDERS DISMISSING PETITION FOR RECONSIDERATION, DENYING PETITION FOR DISQUALIFICATION AND GRANTING PETITION FOR REMOVAL DECISION AFTER REMOVAL

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on July 25, 2024, taking the matter off calendar and ordering an updated evaluation by one of the Panel Qualified Medical Evaluators (PQME) as well as supplemental reporting from the other PQME.

Applicant contends that his case is being unreasonably delayed, and that there is substantial evidence upon which the WCJ may make a finding on his case. Applicant also requests that sanctions be imposed upon the defendant for their delays in reimbursement, and that the case be reassigned to another WCJ.

We received an Answer from defendant.

We received a Report and Recommendation (Report) from the WCJ, which recommends that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record, and as discussed below, we will dismiss the Petition for Reconsideration, as the July 25, 2024 F&O was an interim order and not a final order subject to reconsideration. Also based on this review, and for the reasons set forth below, we will treat the

petition as one seeking removal, grant the petition for removal, rescind the July 25, 2024 Findings and Order, and return this matter to the district office for further proceedings.

Further to the extent the petition also seeks disqualification of the WCJ from this case, for the reasons discussed below, we will deny disqualification.

I.

Former Labor Code 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, Labor Code 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.
>
> (b)
>
> (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.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code 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 August 27, 2024 and 60 days from the date of transmission is Saturday, October 26, 2024. The next business day that is 60 days from the date of transmission is Monday, October 28, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, October 28, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Labor Code 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. Labor Code 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 August 13, 2024, and the case was transmitted to the Appeals Board on August 27, 2024. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under Labor Code section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on August 27, 2024.

No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate notice of transmission as required by Labor Code section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on August 27, 2024.

II.

Applicant, while employed by defendant on April 14, 2015, sustained injury arising out of and in the course of employment (AOE/COE) to his chest wall and psyche, and claims to have sustained injury AOE/COE to his digestive system and chronic fatigue syndrome (ADJ10035604). Applicant also sustained injury AOE/COE to his psyche during the period May 19, 2014 to May 19, 2015, and claims to have sustained injury to his digestive system and chronic fatigue syndrome (ADJ10036839).

A joint findings and award issued by the WCJ on September 7, 2017 finding industrial injury to applicant's chest and psyche, but not to his digestive system and chronic fatigue syndrome. Both applicant and his counsel filed petitions for reconsideration, and an Opinion and Order Granting Reconsideration dated November 19, 2017 issued in which the matter was sent back for further record development.

Thereafter, applicant was evaluated by QMEs Meghan Marcum, Psy. D., and Cranford Scott, M.D., who both authored several medical reports.

On October 10, 2023, applicant filed a Declaration of Readiness to Proceed (DOR) to proceed to a Mandatory Settlement Conference (MSC) on all issues.

After several continuances of the MSC, on May 13, 2024, the case was continued to the WCJ's trial calendar of July 25, 2024 with the WCJ noting in the Comments on the Minutes of Hearing (MOH):

> "Parties understand that this is not a trial but a way for parties to speak
> w/WCJ w/o many time encumbrances."
> (MOH, May 13, 2024.)

At the hearing of July 25, 2024, after discussion with the parties, the WCJ issued findings on the minutes and ordered the case off calendar on his own motion.

On August 5, 2024, applicant filed the Petition for Reconsideration.

III.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["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"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ's decision solely resolves intermediate procedural and evidentiary issues relating to the existing medical evidence. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision and the Petition will be dismissed to the extent it seeks reconsideration.

IV.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (*Cortez*) (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (*Kleemann*) (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant...." (*Id.* at p. 158.) As stated by the Supreme Court of California in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission...must find facts and declare and enforce rights and liabilities, - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Minutes of July 25, 2024 reflect the following findings of the WCJ, as set forth in the comments on pages 2 and 3:

> After lengthy discussions w/the parties + review of existing medical record, Dr. Marcum's report appears to be stale and inconsistent as she says that the Chronic Fatigue Syndrome is both psychiatrically related + and non-related (1/10/23 report + 5/18/23 report.) Clarification is needed as the Chronic Fatigue Syndrome needs to have an impairment given. (there has been a previous finding of 3% psyche PD that did not include the Chronic Fatigue Syndrome).

> Dr. Scott says the Chronic Fatigue Syndrome is psychiatrically related BUT the impairment of "total disability" does not appear internally caused.
> Clarification is needed from Dr. Scott to see if there is an internal component that makes him believe the applicant is totally disabled.
> Therefore, for judicial economy + efficiency the following three need to be done before matter can proceed to trial.
> 1. Mr. Volk to send a list of documents that he wishes to go to PQME Dr. Scott + PQME Dr. Marcum w/in 30 days to Δ [defendant]. This is purely a list, no copies. Once received Δ to review list + determine what is ok to be sent. If there is an issue, a DOR can be filed:
> 2. Δ to make an appointment w/Dr. Marcum for minimum of November 1, 2024. Records from applicant to go to Dr. Marcum for review.
> 3. Once records are determined, Δ can request supplemental/non-evaluation report from Dr. Scott.
>
> (MOH, July 25, 2024, pp.2-3.)

While the WCJ discusses the reasoning for his decision to take the matter off calendar for further medical supplementation, and lists the date of several medical reports for such findings, no testimony or evidence was offered or admitted at the hearing.

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Bd. en banc) (*Hamilton*).)

As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at p. 476 citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Here, it appears that the WCJ based his decision solely on a determination that the medical evidence was stale and needed updating and/or clarification, but did not make a record upon which to base these findings.

Thus, we are unable to determine if good cause exists at this juncture due to a lack of an adequate record. Therefore, we must rescind the Finding and Order taking the case off calendar, and return this matter to the trial level for further proceedings consistent with this opinion.

V.

To the extent applicant requests disqualification of the WCJ, we deny it. Section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has "formed or expressed an unqualified opinion or belief as to the merits of the action" (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated "[t]he existence of a state of mind … evincing enmity against or bias toward either party" (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ "shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification … ." (Cal. Code Regs., tit. 8, former § 10452, now § 10960 (eff. Jan. 1, 2020), italics added.) It has long been recognized that "[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated," that "[a] statement containing nothing but conclusions and setting forth no facts constituting a ground for disqualification may be ignored," and that "[w]here no facts are set forth in the statement there is no issue of fact to be determined." (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, italics added.)

WCAB Rule 10960 provides that when the WCJ and "the grounds for disqualification" are known, a petition for disqualification "shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known."

Here, the Petition does not set forth facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to Labor Code section 5311, WCAB Rule 10960, and Code of Civil Procedure section 641(f) and/or (g). Accordingly, the request for disqualification is denied.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **DISMISSED.**

IT IS FURTHER ORDERED that applicant's request for disqualification of the WCJ is **DENIED.**

IT IS FURTHER ORDERED that applicant's Petition for Removal in response to the Finding and Order issued on July 25, 2024 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Finding and Order of July 25, 2024 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 28, 2024

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

ERIC VOLK
BREDFELT, ODUKOYA & HAN

LAS/abs

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