WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JACKIE RICO, *Applicant*

vs.

KING PLASTICS, INC.; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants*

Adjudication Numbers: ADJ18158401, ADJ18158400
Pomona District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION AND GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Applicant filed this Petition for Reconsideration and/or Removal ("Petition"), seeking review of the workers' compensation administrative law judge (WCJ)'s April 19, 2024 Joint Findings and Order ("F&O"), wherein the WCJ determined that the second Qualified Medical Examiner ("QME") panel in these cases was improperly obtained before the cumulative trauma claim was denied, that the proper specialty for both claims is orthopedics, and that although the first QME panel was also improperly obtained in violation of Labor Code section 4062.2[1], the parties should meet and confer to determine whether to use that panel anyway or to obtain a replacement panel. Applicant contends that the WCJ erred in finding the second QME panel improperly obtained, and therefore that the WCJ also erred in his other orders.

We received an Answer. We also received a Report from the WCJ, recommending that the Petition be denied. For the reasons discussed below, we will dismiss the Petition to the extent it seeks reconsideration because it seeks review of a non-final order, but will grant the Petition as a petition for removal, rescind the F&O, and issue a new order finding applicant's QME panel properly obtained.

[1] Further references are to the Labor Code unless otherwise specified.

FACTS

Applicant filed two Application for Adjudication, alleging injuries to a wide range of body parts while employed by defendant as a packer. In Case No. ADJ18158400, applicant alleged a specific injury sustained on February 22, 2022. In Case No. ADJ18158401, applicant alleged a cumulative trauma injury sustained from February 22, 2022 through August 2, 2023. The applications were signed on August 11, 2013 by applicant, but not served until August 24, 2023, and not filed until August 30, 2023.

On August 16, 2023 – prior to receiving notice that applicant was represented by counsel – defendant denied the claim in Case No. ADJ1815400, the specific claim. As a result, this document was not served on applicant's counsel. On August 31, 2023, defendant issued a delay notice on Case No. ADJ1815401, the cumulative trauma claim. Defendant ultimately denied the claim on November 27, 2023.

Meanwhile, on September 6, 2023, defendant initiated the QME process in Case No. ADJ1815400, the specific claim, obtaining a QME panel in the specialty of orthopedics. Applicant, by contrast, obtained a QME panel in the specialty of chiropractic on September 21, 2023 in Case No. ADJ1815401, the cumulative trauma claim.

Defendant responded by filing a Declaration of Readiness to Proceed objecting to applicant's panel as duplicative and improper, and the matter ultimately went to trial on February 26, 2024, with the two cases consolidated for hearing. The issues for decision were listed as: (1) Panel QME dispute; (2) whether a replacement panel was appropriate after applicant became represented; (3) whether the panel in the cumulative trauma claim was valid based upon the delay and subsequent denial notice; and (4) the appropriate specialty for the panel. (Minutes of Hearing / Summary of Evidence (MOH/SOE), 2/26/2024, at p. 3.) Exhibits were admitted, trial briefs were accepted, and the matter was taken under submission. (*Id.* at pp. 3–5.)

On April 19, 2024, the WCJ issued his F&O. The WCJ found that the panel issued in the specific injury case was invalidly obtained because it was not served on applicant's attorney, in violation of sect 4062.2. (F&O, at ¶ 1.) However, the WCJ also found that applicant obtained the panel in the cumulative trauma claim before the claim was denied, and therefore that panel was also improperly and prematurely obtained. (F&O, at ¶ 2.) The WCJ further found that the appropriate specialty for both cases was orthopedics, and ordered the parties to confer as to whether

they wished to use the panel from the specific injury case or obtain a new orthopedics panel instead. (F&O, at ¶ 3; p.2.)

This Petition followed.

DISCUSSION

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.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (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).)

Here, the WCJ's order is not a final order because it does not determine any substantive right or liability, nor is it a threshold issue fundamental to the claim for benefits. Accordingly, we will dismiss the Petition to the extent it seeks reconsideration.

Considering the Petition as a petition for removal, we note initially that neither party disputes the WCJ's finding that defendant's original panel was improperly obtained. Nor does either party dispute that a single QME panel should handle both cases.

With those legal conclusions in mind, we turn to the question of whether applicant's QME panel was properly obtained. Because defendant does not contest that its QME panel was improperly obtained due to failure to follow the requirements of section 4062.2, applicant's QME panel was not an improper attempt to obtain a second QME panel where there was already a valid QME panel applicable to the case, but rather a valid request for a replacement panel triggered by applicant becoming represented. (See generally (*Romero v. Costco Wholesale* (2007) 72 Cal. Comp. Cases 824, 828.)[2]

Accordingly, the only possible basis for finding applicant's QME panel improperly obtained was the one the WCJ relied upon – a finding that it was prematurely obtained because defendant had not yet denied the cumulative trauma claim.

Section 4062.2, subdivision (b) states: "No earlier than the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060 or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation." However, case law establishes that where a claim has been denied, it is sufficient for an applicant to wait 10 days after the issuance of the denial form, without the need to send a specific request letter and then wait 10 days. (See, e.g., *Bahena v. Charles Virzi Constr.* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 638, at p. *13 (panel decision).) This is because the purpose of the amendments was to streamline the process for requesting QME panels, and to eliminate unnecessary delay. (*Ibid.*, at p. 13.) Similarly, we have also held that a delay letter is sufficient to allow a party to seek a QME panel. (*Montoya v. Burger Buddies, LLC* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 242, at p. *9 (panel decision); *Chavarria v. Crews of Cal*. (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 534, at p. *8 (panel decision).) As noted in *Chavarria,* "[b]oth parties have the right to perform discovery regarding the causation of applicant's injury while an employer determines whether to accept a claimed injury," and "the combination of an applicant filing a claim form, and an employer

[2] As such, we do not share the WCJ's view that applicant's manner of obtaining the replacement panel was taking impermissible advantage of a "quirk" or "loophole" in the system.

notifying the applicant that further discovery is needed is sufficient to meet that definition [of a "request for medical evaluation" under section 4600]." (*Ibid.*)

In light of the above, we believe the WCJ was unnecessarily preoccupied with whether the delay letter specifically mentioned the need for a medical evaluation. Here, it is abundantly clear from the overall course of the litigation – defendant's denial of applicant's specific injury claim, and the delay letter issued in the cumulative trauma claim – that a medical evaluation would at some point be required. Indeed, defendant itself requested and obtained the first QME panel in these cases. Under the circumstances, requiring applicant to wait until the cumulative trauma claim had been denied – as it ultimately was – would have served no purpose except to further delay proceedings. We do not think that section 4602.2, designed to streamline the process of obtaining a QME panel, requires such needless delay.

To the extent that defendant cites *Rayo v. Certi-Fresh Foods, Inc.* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 58 for the proposition that a delay letter that does not mention a medical evaluation is insufficient to allow for the issuance of a QME panel, we disagree that the case is apposite here, for the reasons stated above. Whatever the situation may have been in *Rayo*, here the necessity of a medical evaluation is plain based on defendant's own course of conduct, and requiring applicant to wait because the delay letter did not specifically mention the phrase "medical evaluation" would be to put form over substance and endorse a "magic words" theory of statutory interpretation we believe is at odds with the intent of the statute and the general shape of the workers' compensation system.

Accordingly, we will grant the Petition as a petition for removal, and amend the WCJ's order to find that applicant's QME panel was validly issued. Because applicant's QME panel is valid, we will also amend the order to remove the WCJ's finding that any future QME panel should be in orthopedics rather than chiropractic; it appears this dispute was only relevant in the event that applicant's panel was found to be invalid and the parties were required to seek a new QME panel. Moreover, even if we construe the dispute as one involving defendant's objection to the existing QME panel, applicant properly requested a QME panel in that specialty, the same specialty as his treating physician. We are not persuaded by defendant's argument that applicant's treating physician's request for an orthopedic consultation as part of his treatment indicates that a chiropractor could not properly evaluate applicant's injuries. Nor did defendant comply with the

process outlined in Rule 31 by sending its objection to the specialty to the Medical Unit before seeking a ruling from a WCJ. (See Cal. Code Regs., tit. 8, §§ 31.1(a), 31.5(a)(10).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the April 19, 2024 Joint Findings and Order is **DISMISSED**.

IT IS FURTHER ORDERED that the Petition for Removal of the April 19, 2024 Joint Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the April 19, 2024 Joint Findings and Order is **RESCINDED** and the following **SUBSTITUTED** in its place:

JOINT FINDINGS OF FACT

1. The QME Panel 7618228, dated 09/07/2023 in Orthopedics (MOS) requested by defendant on ADJ18158400, was obtained when the applicant was represented, and defendant did not follow Labor Code Sec 4062.2.

2. The QME Panel 7622428, dated 09/21/2023 in Chiropractic (DCH) requested by applicant on ADJ18158401, was not obtained prematurely.

ORDER

QME Panel 7622428 is valid and shall be utilized in these cases.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 8, 2024

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

JACKIE RICO
DEFENDERS LAW
AZIZ & ASSOCIATES

AW/pm

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