WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JENNY MARTIN, *Applicant*

vs.

INQ BRANDS; TECHNOLOGY INSURANCE COMPANY, administered by AMTRUST NORTH AMERICA, *Defendants*

Adjudication Numbers: ADJ12473910
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Orders issued by the workers' compensation administrative law judge (WCJ) in this matter on August 7, 2024. In that decision, the WCJ found that applicant, while employed during the period August 1, 2016 through May 3, 2019 as a production manager at Ontario, California, by defendant INQ Brands, did not sustain injury arising out of and in the course of her employment in the form of hypertension.

The WCJ further found, in pertinent part, that lien claimant Darrell Burstein, M.D. performed valid medical-legal services on or about June 2, 2020 and August 12, 2021, and awarded lien claimant payment of the reasonable value for med-legal exam and services for those dates, plus penalty and interest from the date of service of the billing. The WCJ denied payment for record review and treatment services.

Petitioner contends the WCJ erred in finding defendant liable for payment to lien claimant, as the record fails to document a request by applicant's attorney for a medical-legal evaluation by Dr. Burstein.

Petitioner also asserts that lien claimant's opinion is based upon an inadequate history and does not constitute substantial medical evidence.

We have not received an Answer from lien claimant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

Based upon our preliminary review of the record, we will grant defendant'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.

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.
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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.

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 September 4, 2024 and 60 days from the date of transmission is Sunday, November 3, 2024. The next business day that is 60 days from the date of transmission is Monday, November 4, 2024.

(See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on November 4, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

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 September 4, 2024, and the case was transmitted to the Appeals Board on September 4, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 4, 2024.

II.

Preliminarily, we note the following, which may be relevant to our review:

The Minutes of Hearing and Summary of Evidence (MOH/SOE) dated June 20, 2024 list the following admitted facts:

> 1. Jenny Martin, born [ ], while employed during the period 8/1/16 through 5/3/19, as a production manager, occupational group number unknown, at Ontario, California, by INQ Brands, claims to have sustained injuries arising out of and occurring in the course of her employment to her neck, back, head, lungs, circulatory system, and psyche.
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> 2. At the time of the alleged injury, the employer's workers' compensation carrier was Technology Insurance Company.
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> 3. The normal issues were resolved by way of an Order Approving Compromise & Release on 8/4/22.

[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.

The issues listed for trial were:

1) Medical-legal claim of Darrell Burstein, M.D. and

2) Substantial medical evidence of Dr. Burstein.

(MOH/SOE, 6/20/2024, p.2:3-14.)

The Opinion of the WCJ states in pertinent part:

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This matter comes on for hearing solely on the issue of the lien of Dr. Burstein for his services performed from 5/7/2020 to 8/12/2021.

Statement of Facts

The Applicant claimed cumulative injury from 8/1/2016 to 5/3/2019 to multiple body parts including lungs and circulatory system. She was laid off by the employer "due to the financial need of the employer" on or about 5/3/2019 (Ex. I).

The claim was denied by the employer on 9/4/2019 (Ex. D).

The Applicant's attorney referred the Applicant to Dr. Burstein who is an internist. [He] wrote an initial report of 6/2/2020 (Ex. 7). Dr. Burstein expresses the possibility that her hypertension could be aggravated by work stress. It also appears that he then undertook to treat the patient as well with five follow-up visits all in August 2020.

There are no medical reports found that show what the follow-up visits were for. A letter of 8/12/2021 is nothing more than a review of records (Ex. 6).

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Since the case was denied, the Applicant can procure medical treatment which would include a medical-legal report. A treating physician is allowed to be compensated for preparing a medical-legal report on his or her patient.

(Opinion, p.3-4.)

Petitioner asserts the following:

The Judge issued an Opinion on Decision on August 7, 2024 wherein he states, "the Applicant's attorney referred the Applicant to Dr. Burstein who is an internist". However, the undersigned believes that the Judge erred making this statement as the evidence does not show any indication of AA referring the

applicant for a medical-legal evaluation. There is absolutely no correspondence in the evidentiary record that shows a referral was made from AA to Dr. Berstein (*sic*) for a medical-legal evaluation to resolve a contested issue. In fact, that only evidence in the record that shows where the referral for a comprehensive evaluation came from, is a Request for Authorization from Dr. Curtis dated January 9, 2020. (Please See Lien Claimant's Exhibit 9.)

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On page 4 of the Opinion on Decision, the Judge notes that the case was denied and states that the Applicant is entitled to procure medical treatment, which could include a medical-legal report. Additionally, the Judge asserts that a treating physician may be compensated for preparing a medical - legal report for their patient. However, the undersigned contends that the Judge acted beyond the scope of his authority, as there is no legal foundation supporting the compensation for a medical-legal evaluation conducted by a secondary treating physician.

Under Labor Code Section 4060, "neither the employer nor the employee shall be liable for any comprehensive medical-legal evaluation performed by anyone other than the treating physician." This statute clearly delineates the responsibility for payment, restricting it to evaluations conducted by the treating physician designated as the Primary Treating Physician (PTP).

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In reviewing the evidence submitted by Dr. Darrell Berstein, there is no evidence that establishes him as the designated PTP in this case. Specifically, Dr. Berstein has failed to provide a Section 4600 designation letter from the Applicant's Attorney, which would have confirmed his role as the PTP. The only relevant evidence submitted by the lien claimant, Lien Claimant's Exhibit 9, is a Request for Authorization (RFA) dated January 9, 2020, in which Dr. Thomas Curtis requests a consultation and evaluation by Dr. Berstein, thereby identifying Dr. Berstein as a secondary treating physician, not the PTP.

Given the lack of evidence supporting Dr. Berstein's designation as the PTP, and the clear documentation indicating his role as a secondary treating physician, it is evident that Dr. Berstein was not the PTP in this matter. Consequently, any medical-legal charges arising from an evaluation conducted by him as a secondary treating physician are not the responsibility of the Defendant.

(Petition, p. 2-4.)

In his Report, the WCJ addresses the arguments of petitioner, in pertinent part, as follows:

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The Applicant through counsel filed the Application for Adjudication of Claim on or about 8/20/2019 claiming neurological and psychological injury (EAMS# 30084268). The claim was denied by the Defendant on or about 9/4/2019 (Ex. D).

The Applicant initially undertook treatment with Thomas Curtis M.D. (Ex. 9). This was not authorized since the claim had already been denied.

Dr. Curtis then specifically referred the Applicant to Dr. Burstein in internal medicine as described in detail in Ex. 9. He made the referral because "of medical conditions interfering and complicating his psychological treatment."

Obviously an appointment was made with Dr. Burstein though exactly who made it is unknown. But the fact remains that the referral was made directly to Dr. Burstein who saw the patient by telemedicine on or about 6/2/2020 (Exs. 7 & 8).

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On 8/12/2021 Dr. Burstein did review a packet of medicals this case (Ex. 6). Otherwise his other reports did not reflect on his treatment or on the medical-legal issues.

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Cal. Lab. Code sec. 4620 allows the Applicant to incur medical legal expenses to prove a contested case before the Board. Subsection (b) states:

> "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:
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> (1) The employer rejects liability for a claimed benefit."

Cal. Code of Regs. sec. 9793(c) indicates that a comprehensive medical-legal report may be:

> …(2) performed by a Qualified Medical Evaluator, Agreed Medical Evaluator, or *the primary treating physician for the purpose of proving or disproving a contested claim…"* (emphasis added).

There is no reason why this rule would not apply equally to a secondary treating physician.

When Dr. Curtis was seeing the patient in psychiatry, the case had already been denied by the Employer. Consequently the issue of whether or not Applicant sustained an injury at work was a valid medical-legal issue.

In order to determine that issue, a referral to Dr. Burstein in internal medicine was requested by Dr. Curtis as shown in Ex. 9. Consequently Petitioner's first issue as to who specifically made the referral is answered clearly in Ex. 9.

> Who actually set the appointment with Dr. Burstein is not relevant. Neither Dr. Curtis nor Dr. Burstein were acting a primary or secondary treating physician at the time since the claim was denied. They were treating the patient as self-procured medical expenses.
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> Consequently both Dr. Curtis and Dr. Burstein were treating the patient for what they perceived to be alleged work related injuries. They are permitted to prepare a medical-legal report as treating physicians to prove or disprove a medical-legal issue pending.
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> (Report, p. 2-4.)

III.

It is well established that decisions by 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].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65

Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Here, it is unclear from our preliminary review whether the legal issues have been properly identified and addressed, whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ, and/or whether further development of the record may be necessary with respect to the disputed issue of the lien as noted above.

IV.

Finally, we observe that 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. pp.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *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"].)

Labor Code 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 Labor Code sections 5950 et seq.

V.

Accordingly, we grant defendant'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.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov .

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings Award and Order issued on August 7, 2024 by a workers' compensation administrative law judge 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/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 4, 2024

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

DARRELL BURSTEIN, M.D.
AMTRUST HRU

LAS/abs

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