WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MICHAEL STIERMAN, ***Applicant***

vs.

VILLAS ON THE GREEN;
ZURICH NORTH AMERICA INSURANCE COMPANY, ***Defendants***

Adjudication Numbers: ADJ12549416; ADJ12557141
Riverside District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

On May 16, 2022, defendant filed a Petition for Removal from the Findings and Order (F&O) issued on April 19, 2022 by the workers' compensation administrative law judge (WCJ).

The WCJ found, in pertinent part, that defendant failed to establish that the qualified medical evaluator's (QME) reporting following an examination of applicant was untimely because defendant objected to the report on the last day the report could be received, and thus, may have inadvertently caused the doctor to not issue the report. The WCJ issued an order vacating the replacement panel issued by the Administrative Director.

Defendant argues that its objection was proper as there was no proof the QME received the letter or that the letter caused the QME not to issue a report. Defendant further argues that the requirement for an objection is AD Rule 31.5(a)(12) [Cal. Code Regs., tit. 8, § 31.5(a)(12)] is invalid as it exceeds the scope of Labor Code[1], section 4062.5, and that a replacement QME should issue automatically when reporting is untimely.

[1] All future references are to the Labor Code unless noted.

We have not received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of the Petition and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons stated below, we will grant the petition as seeking reconsideration as the F&O is a hybrid decision that contains both final and non-final orders, however, we will apply the removal standard to the petition and rescind the April 19, 2022 F&O and return this matter to the trial level for further proceedings.

Pursuant to our holding in *Scheuing v. Lawrence Livermore National Laboratory*, our grant of reconsideration is timely as this matter was misfiled with the Office of Commissioners as a 'Petition for Removal' and thus was mislabeled. (2024 Cal. Wrk. Comp. LEXIS 11, [significant panel decision]; see also *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 1104, 9 Cal. Rptr. 2d 345, 57 Cal. Comp. Cases 493.)

FACTS

Applicant claims to have sustained industrial injury to his circulatory system and psyche while employed as a property manager for defendant across two dates. (Minutes of Hearing and Summary of Evidence, April 6, 2022, p. 2, line 13, through p. 3, line 5.) This matter proceeded to trial on the issue of a replacement panel request by defendant. (*Ibid*.)

It appears that applicant was examined by QME Daniel Watson, Ph.D., on October 22, 2021. (Defendant's Exhibit C, QME Appointment Notice, August 31, 2021.) Under emergency regulations in effect, the QME had 45 days to issue an initial report. On the 45th day following the evaluation, defendant issued an objection letter and requested a replacement panel due to untimely reporting. (Defendant's Exhibits A and B.) Defendant's objection letter included an objection to any billing issued by the QME in conjunction with the evaluation. (Defendant's Exhibit A.) It does not appear that the QME has produced a report from the evaluation, as no report has been offered into evidence.

DISCUSSION

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, the following: 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].)

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 petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding of employment, which is a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

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 significant 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, we are persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." 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 v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and 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].) 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.)

As to defendant's first argument, we find that a party must timely object to an untimely report per AD Rule 31.5(a)(12). (Cal. Code Regs., tit. 8, § 31.5(a)(12).) Defendant's argument to the contrary is not persuasive. Rule 31.5 does not exceed the scope of Labor Code section 4062.5, which expressly states that when a formal medical evaluation is not timely completed, "a new evaluation **may** be obtained u**pon the request of either party**[.]" (§ 4062.5, (emphasis added).) First, the Legislature did not use mandatory language in the statute. To the contrary, the statute says a party 'may' obtain a new evaluation. May is permissive. (§ 15.) Next, the statute expressly requires that a party request the new evaluation. The fact that the regulation refers to this request as an 'objection' is entirely appropriate and does not exceed the scope of the enabling statute. Finally, the regulatory requirement that an objection issue prior to the QME's service of the report is an equitable principle grounded in waiver, laches, and estoppel. If a party is genuinely concerned about timeliness, they must object timely.

While it does appear that defendant's objection issued on the final day the QME had to issue the report, the WCJ's opinion relies upon an assumption that the QME received that objection and was influenced by defendant's letter to not issue a report on time. The present record does not establish such facts. As the WCJ's decision is not properly supported by the record, removal is warranted to allow further development.

Accordingly, we will grant reconsideration. Applying the standard for removal we will rescind the April 19, 2022 F&O and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration/Removal is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration that the Findings and Order issued on April 19, 2022 by the workers' compensation administrative law judge is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 26, 2024

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

MICHAEL STIERMAN
CICALESE & JOHNSON LLP
BRADFORD & BARTHEL, LLP

EDL/mc

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