WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERTO ESPINOZA, ***Applicant***

vs.

MARBORG INDUSTRIES; BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY, ***Defendants***

Adjudication Numbers: ADJ14300773; ADJ16390001
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order issued on April 9, 2024 by a workers' compensation administrative law judge (WCJ) in which the WCJ denied applicant's request for a supplemental panel Qualified Medical Evaluator (QME) in the field of internal medicine for cases ADJ14300773 and ADJ16390001.

Applicant contends that the Order denying this request was in error as it was based upon an incorrect assumption that applicant's objection letter invoking the panel process per Labor Code[1] section 4062(a) was untimely.

We received an Answer from defendant.

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

We have considered Petition for Reconsideration, the Answer, and the contents of the Report. Based on our review of the record, and as discussed below, we will grant the Petition for Reconsideration, rescind the April 9, 2024 Findings and Order, substitute a Findings of Fact that applicant is entitled to a panel in internal medicine for case ADJ14300773, and return this matter to the district office for further proceedings.

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

FACTUAL BACKGROUND

Applicant, while employed by defendant during the period January 1, 2003 to August 6, 2020, sustained injury arising out of and in the course of employment (AOE/COE) to his left shoulder, and claims to have sustained injury to his right shoulder, neck, back, hips, knees, legs, wrists, arms, hernia, diabetes, and cardiovascular system. That case was assigned case number ADJ14300773.

Separately, in case ADJ16390001, applicant sustained a specific injury AOE/COE on August 6, 2020 to his back, and claims to sustain injury to his hip. (Minutes of Hearing, p. 2-3, April 3, 2024.)

A trial was previously held November 14, 2023 in case ADJ14300773 on the issue of the applicant's right to an additional QME panel in internal medicine. On December 6, 2023, the WCJ issued a Findings and Order as to employment and admitted parts of body, which also held, in pertinent part, that "There does not appear to be either an objection under Labor Code 4061 or 4062 nor any basis for such an objection at this point in time." The WCJ issued an Order that "…the Panel in Internal Medicine is not necessary nor appropriate at this time." (Findings and Order, p.1-2, December 6, 2023.) Those findings and order were not challenged and thereafter became final.

On April 3, 2024, case ADJ14300773 was again set for trial, along with case ADJ16390001, on the issue of applicant's right to an additional panel in internal medicine. On April 9, 2024, the WCJ issued Findings of Fact and an Order denying applicant's request for an additional panel in internal medicine as to both cases.

Applicant thereafter filed his Petition for Reconsideration.

DISCUSSION

I.

Applicant's Petition solely challenges the finding and order that he is not entitled to an additional QME panel in internal medicine, which is not a finding on a threshold issue. 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 [210 Cal. Rptr.

3d 101, 81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. 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 decision.

Here, the WCJ's decision includes findings regarding employment, as well as injury to the left shoulder in ADJ14300773 and to the back in ADJ1639001, both threshold issues. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains findings that are 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 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 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.

II.

Applicant claims industrial injury as a result of a continuous trauma during the period January 1, 2003 through August 6, 2020, including injury in the form of diabetes and cardiovascular injury in ADJ14300773. Applicant testified in his deposition that he had been diagnosed and started receiving treatment for same “approximately five years ago”. (Ex. M, Volume I of the deposition

transcript of the applicant, October 18, 2022, pp. 15-16:14-25, 1-2.) He further testified that he was taking prescribed medicine for blood pressure and diabetes, prescribed by his family doctor, Vicky Bobadilla at Centers for Family Health Community Memorial Health. (Ex. N, Volume II of the deposition transcript of the applicant, March 29, 2023, p. 69-70: 12-25, 1).

When asked as to whether Dr. Bobadilla told applicant what was or is the cause of either his blood pressure or diabetic conditions, he stated, "No, she just prescribed". (*Id*., p. 71: 6-11).

Further, the orthopedic QME, Andrew Bulczynski, M.D., in his report dated November 21, 2023, reviewed medical records and reporting by Manoj Khatore, M.D., who evaluated applicant on February 10, 2020 for a second opinion on his cardiovascular issues. In his report, Dr. Khatore documented applicant's symptoms relating to his work and lightheadedness when bending forward and standing up. (Ex. O, Report of PQME Bulczynski, November 21, 2023, p. 6).

In their answer, defendant acknowledges that they never raised an issue that the applicant's request for the additional panel was untimely. Defendant states that this is a "red herring" and should not be the basis for the WCJ's denying applicant an Order for an additional panel in case ADJ16490001. (Answer, p. 5.)

Instead, defendant argues that the applicant should not be entitled to the additional panel as he did not follow one of the two traditionally recognized methods upon which to obtain an additional panel QME; to wit, obtain an opinion from either the QME that the disputed issue is beyond their expertise, or, have the treating physician indicating a referral to another physician in that specialty. (*Id.*, p. 7-8.)

Defendant also contends applicant is using "gamesmanship" by objecting to a treating physician medical report in which applicant had no complaints or symptoms to his cardiovascular system documented in the report. (*Supra.*, p. 7-8.) As a result, they claim that applicant's objection to the report of Dr. Notkin and their obtaining a panel in internal medicine was improper. (Ex. L, Letter from Applicant Attorney to defense attorney, January 15, 2024, pg. 2.)

We note that while applicant's December 19, 2023 dispute letter lists three claims and dates of injury for applicant, the date of injury at issue is highlighted as to the Continuous Trauma (CT) claim (Joint Ex. 4, Dispute letter, December 19, 2023). We further note that injuries involving the internal system are being claimed by applicant in the CT case ADJ14300773. Additionally, there is existing medical evidence involving applicant's internal complaints that span the period of industrial exposure for which injury is claimed. Thus, the procurement of a medical opinion as to causation regarding these internal claims are warranted as to the continuous trauma claim.

As to defendant's concern of system abuse or gamesmanship, sufficient remedies exist to combat any alleged gamesmanship in those rare cases where a litigant may request additional panels frivolously or in bad faith. (*Salcido v. Waste Management Collection and Recycling,* 2024 Cal. Wrk. Comp. P.D. LEXIS 63.)[2]

The WCJ has broad discretion under the Labor Code and under our Rules relating to discovery "to issue such interlocutory orders relating to discovery as he determines are necessary to insure the full and fair adjudication of the matter before him, to expedite litigation and to safeguard against unfair surprise." (*Hardesty v. McCord & Holdren* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406].)

In his Joint Findings of Fact the WCJ found that "There are treating doctors or consultative medical reports addressing internal medicine but do not address whether the injuries occurred on an industrial basis for these cases. (Findings of Fact #5, April 9, 2024).

While we agree it is certainly good practice for either the initial QME to opine that an alleged medical condition is beyond their specialty, or for a treating physician to advise of same, and/or address the complaints, the lack thereof should not be the basis for the WCJ to deny the additional panel if there appears to be good cause for issuance of an additional panel. While it does not appear that applicant has amended his continuous trauma application to claim cardiovascular injury, defendant is clearly on notice he is claiming same, per the questions posed at both of applicant's depositions, not to mention the current and prior trial in which applicant attempted to procure an additional QME in internal medicine.

In workers' compensation proceedings, it is settled law that:

(1) Pleadings may be informal (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (*Cairo*) (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500]; *Bland v. Workmen's Comp. Appeals. Bd.* (1970) 3 Cal.3d 324 [15 Cal.Comp.Cases 513]; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 151]; *Liberty Mutual Ins. Co v. Workers' Comp. Appeals Bd.* (*Aprahamian*) (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866]; *Blanchard v. Workers' Comp. Appeals Bd.*

[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and the Workers' Compensation Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) The panel decisions discussed herein are referred to because they considered a similar issue. Practitioners should proceed with caution when citing to a panel decision and verify its subsequent history.

(1975) 53 Cal.App.3d 590, 594-595 [40 Cal.Comp.Cases 784]; *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207- 210 [35 Cal.Comp.Cases 245]);

(2) Claims should be adjudicated based on substance rather than form (*Bland v. Workmen's Comp. Appeals Bd., supra*, 3 Cal.3d 324, 328-334; *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]; *Rivera, supra*, 190 Cal.App.3d at p. 1456; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [24 Cal.Comp.Cases 274]);

(3) Pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, at pp. 925-926 [72 Cal.Comp.Cases 778]); *Martino v. Workers' Comp. Appeals, supra*, 103 Cal.App.4th 485, 490; *Rubio v. Workers' Comp. Appeals Bd., supra*, 165 Cal.App.3d 196, 199- 201; *Aprahamian, supra*, 109 Cal.App.3d at pp.152-153; *Blanchard, supra*, 53 Cal.App.3d at pp. 594-595; *Beaida, supra*, 263 Cal.App.2d at pp. 208-209); and

(4) Technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction. (*Bland v. Workmen's Comp. Appeals Bd., supra*, 3 Cal.3d 324, 331-332 & see fn. 13; *Rivera, supra*, 190 Cal.App.3d at p. 1456; *Aprahamian*, *supra*, 109 Cal.App.3d at pp. 152-153; *Blanchard, supra*, 53 Cal.App.3d at pp. 594-595; *Beaida, supra*, 263 Cal.App.2d at pp. 208-210).)

Similarly, Rule 10517 specifies that pleadings are deemed amended to conform to the stipulations agreed to by the parties on the record or may be amended by the Appeals Board to conform to proof. (Cal. Code Regs., tit. 8, §10517.) These rules represent the application of California's public policy in favor of adjudication of claims on their merits, rather than on the technical sufficiency of the pleadings. Additionally, we observe, "the Board's procedural rules serve the convenience of the tribunal and the [litigants] and facilitate the proceedings. They do not deprive the tribunal of the power to dispense with compliance when the purposes of justice require it, particularly when the violation is formal and does not substantially prejudice the other party." (*Beaida v. Workmen's Comp. App. Bd., supra*, 263 Cal.App.2d at p. 210; *Blanchard, supra*, 53 Cal.App.3d at p. 595.)

Once the parties have been identified and the pleadings amended, the parties may thereafter address the substance of those claims, including any defenses raised by the employer in response thereto.

Labor Code section 4062.2 governs the process to obtain a medical-legal evaluation from a panel QME in a represented case if the parties do not agree on an agreed medical evaluator (AME). (Lab. Code, § 4062.2.) It is unclear from the record whether the defendant has denied liability for applicant's claimed injuries to the internal system. In the absence of additional panels in relevant specialties, applicant is effectively prevented from conducting the medical-legal discovery necessary to a determination

regarding the nature and extent of the admitted injury. We therefore agree with applicant that an additional QME panel is appropriate. (See *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906 [the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues].)

In addition, while the WCJ acknowledges in his Opinion on Decision and Report that there is enough evidence to merit the requested QME, and that both sides have a right to complete discovery on all issues in the case, he maintains his denial of applicant's panel request based upon the premise that applicant has not complied with the requirements to complete that discovery. (Report, p. 4-5.)

To the extent that the WCJ seems to have based his findings upon a mistaken assumption as to the timeliness of applicant's objection, we further find the record does not support the existing decision.

Even if correct, that finding as the sole basis for denial of an additional panel in this case would place form over substance.

Administrative Director (AD) Rule 31.7(b) and (c) provide for an additional QME panel in another specialty as follows in relevant part:

> …
>
> (b) Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means:
>
> (1) A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or
>
> (2) Where an acupuncturist has referred the parties to the Medical Unit to receive an additional panel because disability is in dispute in the matter; or
>
> (3) An order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based zip code from which to randomly select evaluators;

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(c) Form 31.7 shall be used to request an additional QME panel in a different specialty.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. We note that here, applicant has testified that he claims injury to body parts outside the field of orthopedic medicine, and existing medical records indicate that applicant has sought treatment for these conditions during the period of industrial exposure. Thus good cause exists for the issuance of an additional panel as requested.

This issue has now occupied two trials in six months, and further delay on this issue by the parties would not ensure an expeditious resolution of this matter.

Consequently, an additional QME panel will be required to fully address the claimed continuous trauma injury in the field of internal medicine.

Accordingly, we grant applicant's Petition for Reconsideration, rescind the April 9, 2024 Findings and Order, and substitute new findings that applicant is entitled to a QME in internal medicine and all other issues are deferred.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings of Fact and Order dated April 9, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact dated April 9, 2024 is **RESCINDED** and that the following is **SUBSTITUTED** therefore:

FINDINGS OF FACT

1. In Case Number ADJ14300773, APPLICANT, ROBERTO ESPINOZA, while employed as a laborer or a sorter in Santa Barbara, California by MARBOURG INDUSTRIES during the period January 1 2003 to August 6, 2020, sustained injury arising out of and occurring in the course of employment to his left shoulder and claims to have sustained injury arising out of and in the course of employment to his right shoulder, neck, back, hips, knees, legs, wrists, arms, hernia, diabetes, and cardiovascular.
2. In Case Number ADJ16390001, APPLICANT, ROBERTO ESPINOZA, while employed on August 6, 2020 as a laborer or a sorter Santa Barbara, California by MARBORG INDUSTRIES, sustained injury arising out of and in the course of said employment to his back and claims to have sustained injury arising out of and in the course of employment to his hip.
3. There is good cause for the issuance of an additional panel for a Qualified Medical Evaluator in internal medicine in Case Number ADJ14300773.
4. All other issues are deferred, with jurisdiction reserved to the WCJ.

ORDER

1. IT IS ORDERED that applicant's request for an additional QME panel in internal medicine in ADJ14300773 is granted.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 24, 2024

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

ROBERTO ESPINOZA
LAW OFFICES OF THOMAS ANDERSON
PEARLMAN, BROWN & WAX

LAS/abs

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