WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAMION MAHR, *Applicant*

vs.

CEDAR FAIR LP, insured by INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, administered by CORVEL CORPORATION, *Defendants*

Adjudication Number: ADJ18711098
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the November 18, 2024 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as loss prevention/security from April 14, 2019 to April 13, 2023, claims to have sustained industrial injury to his psyche, stress, back, shoulders, and right knee. The WCJ found good cause to grant defendant's petition for a replacement panel of Qualified Medical Evaluators (QMEs).

Applicant contends that there has been no improper communication between applicant and the QME, and that in the alternative, the record should be developed to ascertain the correct timeline and location of documents transmitted to the QME.

We have 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 the allegations of the Petition for Reconsideration 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 discussed below, we will grant applicant's petition, rescind the F&O, and return the matter to the trial level for development of the record.

FACTS

Applicant claimed injury to his psyche, stress, back, shoulders, and right knee while employed as a loss prevention/security by defendant Cedar Fair from April 14, 2019 to April 14, 2023. Defendant denies liability for the claim.

Applicant selected Kamal Freiha, Psy.D., as the QME in psychology. Dr. Freiha evaluated applicant on October 23, 2023, and issued a corresponding report on November 22, 2023. (Ex. 2, Report of Kamal Freiha, Psy.D., dated November 22, 2023.)

On June 10, 2024, the parties undertook the deposition of Dr. Freiha. Therein, defendant inquired with regard to two written statements referenced in the QME's November 22, 2023 report, as follows:

> Q. So then why on Page 3 does it state the applicant provided you with two written statements?
> A. It does not say that he provided me. It says "he provided."
> Q. Now, you provide a review of records --
> A. I'm sure that -- I'm sure that, you know, the management didn't create these documents and say they were from him and slip them into the medical records. They were in there. They were written by him. They were part of the medical records. So to me, the language of "he provided" is accurate in this case.
> Q. Now, if they're part of the medical record, why are they not summarized in the review of records that begins on Page 5?
> A. That's a very good question. That is probably an oversight by the medical record reviewer.
> Q. So you personally did not review the records yourself?
> A. I did. And that's how I know that they're in there. Because I reference them.
> Q. Who's the medical record reviewer you're referring to?
> A. You would have to ask my practice management boss. You know how these things work.
> Q. Well, they're at least different. So that's why I'm asking the question.
> A. Sure. So he uses somebody that summarizes the records. I am provided with the records and the summary. I look through the summary and the records and make sure that I have not missed anything. And so here's a case in which the medical record reviewer somehow skipped over those documents. However, they were clearly there for me. Although I could double-triple-check and make sure that they were not provided in a different way, if you want to just hang on a quick second here. Give me about 30 seconds, and I'll be able to let you know and possibly correct my statements. Excuse me. I'd like to correct the record. These were provided by Mr. Mahr to my practice management company in their own file. They were not part of the medical record file that came from whoever sent the medical records file,

which I do believe was the defense. So thank you for the opportunity to clarify that.

Q. So these records were provided directly by the applicant to your office?

A. That's my assumption. Again, I don't know who sent what records to them. Their job is to compile those records and provide them to me. I'm happy to find that out, if you're interested.

Q. Well, you're aware of the prohibition against ex parte communication and allowing both parties to review records before serving them on the doctor; correct?

A. I am aware.

Q. So this is a case where the applicant may have just provided these records directly to you without providing them with the defense, it looks like.

A. He provided them to my management company, and my management company would generally be aware of how those things work specifically. Although I would imagine that if he had provided them to me, they had also provided them to you.

Q. Since it's mentioned -- since it's mentioned under the History of Injury, you took this information into account when preparing your report; correct?

A. Minimally so.

Q. Well, you either took them into account or you didn't. Did you take them into account partially at least?

A. Partially at least.

(Ex. D, Transcript of the Deposition of Kamal Freiha, Psy.D., dated June 10, 2024, at p. 10:14.)

On June 20, 2024, defendant filed a petition seeking a replacement panel of QMEs in psychiatry, alleging ex parte communication between applicant and the QME in contravention of Labor Code[1] section 4062.3.

On July 8, 2024, applicant filed an objection to defendant's petition for replacement panel.

On October 7, 2024, the parties proceeded to trial, in relevant part, on the issue of defendant's petition for replacement panels and associated costs. (Minutes of Hearing, dated October 7, 2024, at p. 2:11.)

On November 18, 2024, the WCJ issued an order granting defendant's petition and ordered the parties to proceed with selection of a new panel QME in psychology pursuant to section 4062.2. The WCJ's Opinion on Decision reviewed Dr. Freiha's deposition transcript and took specific note of the QME's testimony that two written statements were provided by applicant to the QME's practice management company. (Opinion on Decision, at p. 2, citing Ex. D, Transcript of the Deposition of Kamal Freiha, Psy.D., dated June 10, 2024, at p. 12:3-7.)

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

Applicant's Petition observes that Dr. Freiha's testimony with respect to the provenance of the two written statements was couched as the doctor's assumption, and that the doctor was "unclear on the exact location of where the documents … came from." (Petition, at p. 2:11.) Applicant further asserts that the documents were requested by the QME during the lunch break on the day of the telehealth evaluation on October 23, 2023. (*Id.* at p. 2:17.) Applicant avers that because the evaluating physician requested the document "in the course of the examination or at the request of the evaluator," the provision of the documents to the QME was not prohibited under section 4062.3(i).

Defendant's Answer responds that pursuant to Dr. Freiha's testimony, two written statements were "neither provided at the request of the evaluator nor directly to the evaluator … [and] were not included in the review of records." (Answer, at p. 5:20.)

The WCJ's Report observes:

> Dr. Freiha testified initially he thought the written statements were part of Applicant's medical record and they were provided by the doctor's "practice management people". **Defendant's Exhibit D, pg. 9.** The doctor then guessed the statements were provided by defendant. **Id. pg. 10.** Dr. Freiha clarified his testimony by stating, "These were provided by Mr. Mahr to my practice management company in their own file. They were not part of the medical record file…Again, I don't know who sent what records to them". **Id. pg. 12.** The written statements made by the Applicant were not at the request of the evaluator nor made in the course of examination.

(Report, at p. 3.)

Accordingly, the WCJ recommends that we deny applicant's Petition.

DISCUSSION

I.

Former 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, 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 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 December 18, 2024 and 60 days from the date of transmission is Sunday, February 16, 2025. The next business day that is 60 days from the date of transmission is Tuesday, February 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Tuesday, February 18, 2025, so that we have timely acted on the petition as required by section 5909(a).

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. 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 December 18, 2024, and the case was transmitted to the Appeals Board on December 18, 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 18, 2024.

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[2] 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.

II.

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.

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 decisions.

Here, the WCJ's decision includes, inter alia, a finding of employment, which is a final order subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].)

Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding/order for the issuance of a replacement panel of QMEs. Therefore, we will apply the removal standard to our review. (See *Gaona, supra,* 5 Cal.App.5th 658, 662.)

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).)

The parties dispute whether applicant engaged in ex parte contact with the QME. Section 4062.3 provides, in relevant part:

> (e) All communications with a qualified medical evaluator selected from a panel before a medical evaluation shall be in writing and shall be served on the opposing party 20 days in advance of the evaluation. Any subsequent communication with the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator.
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> …
>
> (g) Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.
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> …
>
> (i) Subdivisions (e) and (g) shall not apply to oral or written communications by the employee or, if the employee is deceased, the employee's dependent, in the course of the examination or at the request of the evaluator in connection with the examination.

(Lab. Code, § 4062.3.)

Defendant contends that a new medical examiner should be appointed because the applicant engaged in ex parte communication with the QME *prior to* the examination. (Petition for Replacement Panel, dated June 20, 2024, at p. 2:1.) Applicant responds that the record does not substantively address the specifics of how the two written statements provided by applicant were transmitted to the QME. (Petition, at p. 2:9.) Applicant also asserts that the QME requested the records during the course of the QME evaluation, and that the records are therefore not ex parte contact as described in section 4062.3(i). (*Id.* at p. 4:15.)

The WCJ's Report reviews the transcript of the deposition of Dr. Freiha, and notes that the QME initially "thought the written statements were part of Applicant's medical record and they were provided by the doctor's 'practice management people,'" but later "guessed the statements were provided by defendant." (Report, at p. 3.) The QME later acknowledged that he was not sure "who sent what records to [the practice management company]." (*Ibid*.) Because "[t]he written statements made by the Applicant were not at the request of the evaluator nor made in the course of examination," the WCJ concludes the provisions of section 4062.3(i) regarding physician requested information during the course of an examination are inapplicable. (*Ibid*.)

We observe, however, that the mechanism by which the records were transmitted to the QME is a necessary consideration in determining whether there was impermissible contact between applicant and the QME in contravention of section 4062.3. Here, the QME testified to being unclear as to the provenance of the two written statements. Dr. Freiha explicitly acknowledges that his conclusions are based on assumptions about which party transmitted the records, with the QME testifying, "I don't know who sent what records to them … I'm happy to find that out, if you're interested." (Ex. D, Transcript of the Deposition of Kamal Freiha, Psy.D., dated June 10, 2024, at p. 11:11.)

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with section 5313. An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall "make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (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 475.) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]" (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).

The WCJ and the Appeals Board have a duty to further develop the record when there is insufficient evidence to adjudicate an issue. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The WCAB 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].) Accordingly, the WCJ or the Board may not leave undeveloped matters within its acquired specialized knowledge (*Id*. at 404).

Here, the evidentiary record does not disclose when or how the two written statements provided to the QME were transmitted, and whether they were transmitted to the QME directly or to another entity. In addition, the record does not disclose whether the QME requested these records during the telehealth evaluation on October 23, 2023. Because the factual determination of how and why the records in question were transmitted to the QME is a necessary consideration in the evaluation of the issues presented, we conclude that the current record is insufficient to allow for a complete adjudication of this matter.

Accordingly, and applying the removal standard to the WCJ's hybrid decision, we will grant reconsideration, rescind the F&O, and return this matter to the trial level for further proceedings and decision by the WCJ. Upon return of this matter to the trial level, we recommend the WCJ direct the parties to develop the record with respect to when and how the two witness statements were transmitted to the QME.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of November 18, 2024 is **GRANTED**.

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on November 18, 2024 is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 13, 2025

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

DAMION MAHR
KESHISHI LAW, APC
ALBERT & MACKENZIE

SAR/bp

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