WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANNY PHAM, *Applicant*

vs.

GARFF ENTERPRISES, INC., dba WEST COAST TOYOTA; ZURICH AMERICAN INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ17198125
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the petition for removal 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 based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will treat the petition as one for reconsideration and deny reconsideration.

I.

Preliminarily, we note that former Labor Code section 5909[1] 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. Effective July 2, 2024, section 5909 was amended to state in the 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.

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

> (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."

According to Events, the case was transmitted to the Appeals Board on March 13, 2025, and 60 days from the date of transmission is May 12, 2025. This decision is issued by or on May 12, 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 March 13, 2025, and the case was transmitted to the Appeals Board on March 13, 2025. 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 March 13, 2025.

II.

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].) 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 decisions.

The WCJ's decision here includes inter alia findings of injury and employment, threshold issues. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Thus, we treat defendant's petition as one for reconsideration. 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 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, based upon the WCJ's analysis of the merits of petitioner's arguments, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

III.

As found by the WCJ in the Findings and Order, while employed on December 22, 2022, by defendant as a mechanic, applicant sustained injury to the second and third fingers of his left hand and to his psyche.

The panel qualified medical examiner (PQME) took a history of applicant using a machine and when he pressed the hub and bearings in, it suddenly exploded. Applicant believes it was the metal bearing that hit his left hand, injuring his index and middle fingers. (Joint exhibit 2, Saiyon Hou, M.D., PhD., June 26, 2023, page 2.) On re-evaluation the PQME noted that applicant was seen by psychologist, Dr. Lawrence Lyon, for PTSD, anxiety, and insomnia. Applicant had been referred to cognitive behavior therapy. (Joint exhibit 1, Saiyon Hou, M.D., PhD., March 11, 2024, page 2.)

On December 30, 2024, the parties proceeded to trial. As relevant here, the parties stipulated that applicant sustained injury to his psyche. Applicant sought a PQME in psychiatry to address the issue of permanent disability. Defendant asserted that the psychiatric injury is a compensable consequence of the orthopedic injuries and therefore section 4660.1(c) eliminates entitlement to a PQME in psychiatry. (Minutes of Hearing, Summary of Evidence, December 30, 2024, page 2, lines 16 to 18 (hereafter MOH).) Applicant testified that he suffers stress and anxiety as a result of the incident, and "every time he goes by the area, he gets scared, trembles, and is sweaty. He agreed he is afraid of loud noises now. He does not work with that machine anymore." (MOH, page 4 lines 17 to 19.)

Section 4660.1 was originally enacted as part of Senate Bill (SB) 863 and became effective on January 1, 2013. (Stats. 2012, ch. 363, § 60.) The original language of section 4660.1(c)(1) was:

> Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury. (Former Lab. Code, § 4660.1(c)(1), amended by Stats. 2019, ch. 497, § 189, eff. Jan. 1, 2020.)

On May 10, 2019, the Appeals Board issued an en banc decision analyzing the statute in its original language and concluding in relevant part:

> Section 4660.1(c) does not bar an employee from claiming a psychiatric injury or obtaining treatment or temporary disability for a psychiatric disorder that is a compensable consequence of a physical injury occurring on or after January 1, 2013. *Additionally, section 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment.* Section 4660.1(c)(1) only bars an increase in the employee's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013. (*Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393, 403 (Appeals Board en banc), emphasis added.)

Section 4660.1 was amended effective January 1, 2020 as part of Assembly Bill (AB) 991. The amended statute remains substantively unchanged relative to the discussion at hand. AB 991 is referred to in the Legislative Counsel's digest as "Maintenance of the codes." (Legis. Counsel's Dig., Assem. Bill No. 991 (2019-2020 Reg. Sess.).) The digest states the following for AB 991:

> Existing law directs the Legislative Counsel to advise the Legislature from time to time as to legislation necessary to maintain the codes.
>
> This bill would make nonsubstantive changes in various provisions of law to effectuate the recommendations made by the Legislative Counsel to the Legislature. (*Id.*)

The Legislature is presumed to be aware of prior judicial construction of a statute when making amendments. (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659.) It may thus be presumed that the Legislature was aware of the May 10, 2019, *Wilson* en banc decision when it amended section 4660.1(c)(1) as part of AB 991.

In *Wilson*, the Appeals Board opined that in order to receive an increased impairment rating for a psychiatric injury, the employee "bears the burden of proving [the] psychiatric injury was directly caused by events of employment." (*Wilson*, *supra*, 403.) The decision further clarified that causation of an injury may be either direct or a compensable consequence of an injury:

> Causation of an injury may be either direct or as a compensable consequence of a prior injury. More precisely, an injury may be directly caused by the employment. Alternatively, a subsequent injury is a compensable consequence of the first injury where it "is not a new and independent injury but rather the direct and natural consequence of the" first injury. (*Carter v. County of Los Angeles* (1986) 51 Cal.Comp.Cases 255, 258 (Appeals Board en banc).) (*Id.*)

Due to this distinction between direct and compensable consequence psychiatric injuries, the *Wilson* decision held that:

> The evaluating physicians must render an opinion as to whether the psychiatric injury was predominantly caused by actual events of employment. The physicians must further specify if the psychiatric injury is directly caused by events of employment or if the psychiatric injury is a compensable consequence of the physical injury. (*Id.* at p. 414.)

Here, applicant contends that his psychiatric condition was directly caused by the injurious event.

The applicant has the burden of establishing an industrial injury by a preponderance of the evidence. (Lab. Code, §§3202.5, 5705.) For the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) (*Clark*), 61 Cal.4th 291, at pp. 298-299 [80 Cal.Comp.Cases 489].) "The applicant in a workers' compensation proceeding has the burden of proving industrial causation by a 'reasonable probability.' (citation) That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700- 1701 [58 Cal.Comp.Cases 313].)

Medical evidence that industrial injury was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workers' Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) Although the factual issue of the occurrence of the alleged incident is a determination for the WCJ, the issue of injury is a medical determination, which requires expert medical opinion. As the Court of Appeal explained in *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188]: "Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences."

The determination of whether a psychiatric injury is a direct result of the injury, or a compensable consequence, is an occult issue that clearly requires medical opinion. Additional discovery is appropriate so a physician may specify if the psychiatric injury is directly caused by

events of employment or if the psychiatric injury is a compensable consequence of the physical injury.

As our decision only addresses a discovery issue, we express no opinion on the merits of the claim. And, as there is no showing substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner, we deny defendant's petition as one for reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 28, 2025

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

DANNY PHAM
LAW OFFICES OF NORMAN J. HOMEN
LAW OFFICES OF HIRSCHL MULLEN

PS/oo

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