WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

REY MANALANG, *Applicant*

vs.

THE CITY LINK FOUNDATION, permissibly self-insured, administered by NONPROFITS UNITED through its claims administrator SEDGWICK, *Defendants*

Adjudication Number: ADJ9595324
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER 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 the petitioner's arguments in the WCJ's report and for the reasons stated below, we will grant reconsideration for the purpose of deferring issues related to the alleged violations of Labor Code section 4628, but otherwise affirm and restate the decision of January 7, 2025.

I.

Former Labor Code[1] 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.

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

(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 February 5, 2025 and 60 days from the date of transmission is Sunday, April 6, 2025. The next business day that is 60 days from the date of transmission is Monday, April 7, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, April 7, 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 February 5, 2025, and the case was transmitted to the Appeals Board on February 5, 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 February 5, 2025.

[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.

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.

Here, the WCJ's decision includes a findings regarding employment and injury arising out of and occurring in the course of employment (AOE/COE), threshold issues. 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 the WCJ's interlocutory findings and orders 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, based upon the WCJ's analysis of

the merits of the petitioner's arguments, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

We also that note applicant's Answer seeks "clarification" of the issue of whether the reporting of existing Qualified Medical Evaluators in orthopedic medicine, internal medicine, gastroenterology, and psychiatry will be submitted to the replacement QME. (Answer, at p. 14:4.)

The WCJ's Report observes:

> Although applicant couches the issues as a request for clarification, the issues are actually new issues that were not raised at the time of trial. (MOH/SOE, 1022/24, 2:13-16.) The only issue presented for determination at trial was the issue of whether Dr. Finkenberg should be replaced as the panel qualified medical evaluator. (MOH/SOE, 1022/24, 2:13-16.)
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> Parties to a workers' compensation claim are entitled to due process under the California Constitution and the United State Constitution. *(Basi v. A Plus Academics* (2021) 87 Cal.Comp.Cases 197, 201.) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." *(Basi v. A Plus Academics* (2021) 87 Cal.Comp.Cases 197, 201, citing *Rea v. WCAB* (2005) 127 Cal.App.4th 625, 643.) A workers' compensation judge may only address issues that have been properly raised and submitted at trial. (*Lamin v. City of Los Angeles* (2004) 69 Cal.Comp.Cases 1002, 1006.)
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> If the parties are unable to agree on whether the reporting of Dr. Finkenberg may be sent to the replacement orthopedic panel qualified medical evaluator and whether the panel qualified medical evaluators in other specialties now need to be replaced because they have reviewed the reporting of Dr. Finkenberg, then the parties need to present those issues for determination at trial. It would be improper for the Court to decide these issues when the issues were not raised at trial on October 22, 2024, and when the parties were not provided with notice and an opportunity to be heard regarding the determination of the issues. (*Basi v. A Plus Academics* (2021) 87 Cal.Comp.Cases 197, 20; *Lamin v. City of Los Angeles* (2004) 69 Cal.Comp.Cases 1002, 1006.)

(Report, at p. 21.)

We agree with the WCJ's analysis. We observe that pursuant to our Rules, "[e]ither party may use discovery to establish the accuracy or authenticity of non-medical records or information prior to the evaluation." (Cal. Code Regs., tit. 8, § 35(f).) However, "[t]he Appeals Board shall retain jurisdiction in all cases to determine disputes arising from objections and whether ex parte

contact in violation of Labor Code section 4062.3 or this section of Title 8 of the California Code of Regulations has occurred." (Cal. Code Regs., tit, 8, § 35k.)

Upon return of this matter to the trial level, the parties are encouraged to seek agreement as to the records to be submitted to the replacement QME. If the parties are unable to reach agreement, they may present the issue to the WCJ for determination. (Cal. Code Regs., tit. 8, § 35(k).)

We write further, however, to address the due process considerations raised by the WCJ's determination that "Dr. John Finkenberg failed to comply with Labor Code section 4628 when he issued his medical reports dated August 23, 2010, and January 19, 2018." (Finding of Fact No. 1.)

Section 4628 requires the evaluating physician to take a complete medical history from the applicant, to review and summarize the prior medical record, and to compose and draft the conclusions of the report. Where the initial outline of a patient's history or excerpting of the applicant's medical record is accomplished by someone other than the physician, the physician must review the excerpts or summary, and make relevant inquiry of the applicant, as well as disclose the name and qualifications of those persons assisting in the nonclerical preparation of the report. (Lab. Code, § 4628(c).)

Where a violation of section 4628 has been identified, and the WCJ has determined that the violation is not curable, the report is inadmissible and any liability for payment of any medical-legal expense incurred in connection with the report is eliminated. (Lab. Code § 4628(e).)

In the event a report violates the report preparation and disclosure requirements of section 4628, due process considerations arise and require the WCJ to carefully follow the notice requirements of section 139.2(d)(2) and Appeals Board Rule 10683. (Lab. Code, § 139.2(d)(2); Cal. Code Regs., tit. 8, § 10683.) In both instances, the due process rights of the *evaluating physician* are implicated, due to the potential consequences of such a finding including the potential loss of QME reappointment under section 139.2(d)(2), and the potential effect on the physician's ability to recover fees for the reporting under section 4628(e).

Here, the record does not reflect adequate notice to Dr. Finkenberg of the section 4628 allegations raised by the parties, nor does it appear the physician been afforded an opportunity to be heard on the issue. Accordingly, we believe that the order finding a section 4628 violation must be rescinded and the issue deferred to allow the parties to provide Dr. Finkenberg with the requisite notice and opportunity to be heard. (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp.*

Appeals Bd. (*Pinkney*) (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461]; *Abron v. Workers' Comp. Appeals Bd.* (1973) 34 Cal.App.3d 232 [38 Cal.Comp.Cases 591]; *Cedeno v. American National Ins. Co.* (1997) 62 Cal.Comp.Cases 939.) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Fortich v. Workers Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases 381]; *Horn v. County of Ventura* (1979) 24 Cal.3d 605 [due process requires reasonable notice and opportunity to be heard]; *Gao v. Chevron Corp.* (2021) 86 Cal.Comp.Cases 44 [2021 Cal. Wrk. Comp. P.D. LEXIS 29] (Appeals Bd. significant panel dec).)

We will grant reconsideration to amend Findings of Fact No. 1 and defer the issue of the alleged violations of section 4628, accordingly.

However, because we agree with the WCJ's analysis with respect to the alleged violations of section 4062.3, and because we further agree that the violations merit the issuance of a replacement panel of QMEs, we will otherwise affirm and, for purposes of clarity, restate the WCJ's January 7, 2025 Findings and Order.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of January 7, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of January 7, 2025 is **RESCINDED**, with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. The issue of whether Panel Qualified Medical Evaluator, Dr. John Finkenberg failed to comply with Labor Code section 4628 when he issued his medical reports dated August 23, 2010, and January 19, 2018 is deferred.
2. Defendant failed to provide applicant with a copy of the witness statements provided to Panel QME, Dr. Finkenberg, as enclosures to the letter sent to Dr. Finkenberg on August 6, 2010.
3. Defendant failed to comply with Labor Code section 4062.3 when it sent the August 6, 2010, letter with enclosed witness statements to Dr. Finkenberg, sent the March

29, 2017, letter with enclosures to Dr. Finkenberg, and sent the February 15, 2019, letter with enclosed subpoenaed records to Dr. Finkenberg.

ORDERS

IT IS HEREBY ORDERED that Dr. John Finkenberg shall be replaced as the orthopedic qualified medical evaluator in this case.

IT IS FURTHER ORDERED that the Medical Director, Division of Workers' Compensation, shall issue, within 30 days of its receipt of this Order, a QME panel in the specialty of orthopedic surgery (MOS), within a reasonable geographic area of applicant's residential zip code of 92020. The parties may strike doctors from the panel and schedule an appointment with the replacement qualified medical evaluator in accordance with the procedures set forth in Labor Code section 4062.2.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
APRIL 7, 2025
SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

REY MANALANG
GATTI FOZ
MISA STEFEN KOLLER WARD
EMPLOYMENT DEVELOPMENT DEPARTMENT

SAR/*cs*

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