WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KENNETH ROSENBROOK, *Applicant*

vs.

KNIGHT-SWIFT TRANSPORTATION HOLDINGS, INC.;
permissibly self-insured, administered by GALLAGHER BASSETT SERVICES, INC.,
Defendants

Adjudication Number: ADJ9115204
Riverside District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 16, 2020.[1] By the F&O, the WCJ found in relevant part that applicant sustained an injury arising out of and in the course of employment (AOE/COE) to his low back. The WCJ also found that defendant's denial of the panel qualified medical evaluation via telehealth format is unreasonable pursuant to emergency regulation section 46.2. (Cal. Code Regs., tit. 8, § 46.2.)

Defendant contends that the evidence does not support a finding that a telehealth evaluation with the qualified medical evaluator (QME) is justified and the WCJ exceeded his authority by finding that defendant unreasonably denied a telehealth evaluation.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the

[1] The WCJ designated defendant's attorney to serve the F&O and cited the Appeals Board's March 18, 2020 In Re: COVID-19 State of Emergency En Banc (Misc. No. 260) for emailing the F&O only to defendant's attorney and designating service. In the en banc decision, the Appeals Board suspended WCAB Rule 10628, which requires service by the WCAB by mail unless a party has designated email for service. (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020).) The decision stated that service by the WCAB may be made electronically with or without parties' consent, but did not state that the WCAB may designate a party to serve a final decision, order or award. The district offices should still serve all parties of record with a final decision, order or award (whether electronically or otherwise), not designate a party to serve.

record and for the reasons discussed below, we will deny the Petition.

FACTUAL BACKGROUND

Applicant claims injury to the low back, urology system, and internal system in the form of diabetes and hypertension on June 27, 2013 while employed as a driver by Knight-Swift Transportation Holdings, Inc. Defendant has accepted the low back as compensable, but disputes the other alleged body parts.

Applicant filed an Amended Application for Adjudication on March 5, 2019 adding the internal system (diabetes and hypertension) and urology as claimed body parts. On April 3, 2019, defendant sent applicant a Notice Regarding Partial Denial of Workers' Compensation Benefit stating in relevant part:

> After careful consideration of all available information, we are accepting liability only for your claim of injury to lumbar spine. Liability is being denied for lower extremities, digestive system, abdomen, internal system, diabetes, hypertension and urology because there is no factual or medical evidence to support injury on an industrial basis to lower extremities, digestive system, abdomen, internal system, diabetes, hypertension and urology.
>
> (Applicant's Exhibit No. 1, Denial notice of Gallagher Bassett Services, April 3, 2019, p. 1.)

A QME panel in internal medicine issued and Dr. Bahman Omrani was selected from the panel. On August 21, 2020, applicant sent a letter to Dr. Omrani asking the following:

> Would you please advise the parties if a telehealth appointment is reasonably capable in this case? Do you believe that a physical exam is not required? If testing is necessary, the parties could consider Mr. Rosenbrook undergoing the testing in a geographic location close to his home.
>
> (Applicant's Exhibit No. 2, Letter to Dr. Omrani, August 21, 2020.)

On August 26, 2020, Dr. Omrani faxed applicant's August 21st letter back with the following in handwriting: "I Dr. Omrani will conduct the PQME appointment for patient Rosenbook, Kenneth via telehealth w/o a physical examination." (*Id.*) Dr. Omrani's signature is under this statement.

Applicant filed a declaration of readiness to proceed (DOR) to an expedited hearing on September 21, 2020 with the disputed issue identified as:

> AT LAST EXPEDITED HEARING, PARTIES AGREED TO SEND JOINT CORRESPONDENCE TO PQME DR. OMRANI REGARDING WHETHER HE FELT A TELEHEALTH APPOINTMENT WAS APPROPRIATE. PQME DR. OMRANI HAS CONFIRMED THAT HE WOULD MOVE FORWARD WITH A TELEHEALTH APPOINTMENT. TO DATE, DEFENDANT HAS FAILED TO AGREE TO MOVE FORWARD WITH A PQME TELEHEALTH APPOINTMENT. WCAB ASSISTANCE NEEDED. APPLICANT RESERVES THE RIGHT TO REQUEST PENALTIES, SANCTIONS & ATTORNEYS' FEES.
>
> (Applicant's DOR, September 21, 2020, p. 2.)

The matter proceeded to an expedited hearing on October 26, 2020 on the following issue:

> Whether a telehealth evaluation with PQME Dr. Bahman Omrani in internal medicine is in accordance with CCR 46.2 as properly applied to this case.
>
> (Minutes of Hearing and Summary of Evidence (Expedited), October 26, 2020, p. 2.)

Applicant testified at trial as follows in pertinent part:

> He currently lives in Washington State. The appointment with Dr. Omrani was set for California. To attend that examination, he would need to travel and have lodging and meals.
>
> He has certain medical conditions as well as those living with him that are protected as confidential. There are preexisting medical conditions, and he has concerns about traveling to an in-person examination. He is concerned about the rising COVID-19 and bringing home something to the family. He has left the house only once or twice to go grocery shopping since March of 2020.
>
> He would agree to a telehealth examination with Dr. Omrani. He lives near Puyallup, Olympia, and Tacoma. If testing were required, he could go to one of these geographical locations. He could attend a telehealth examination by either video or telephone.
> …
> His internal complaints relating to his injury are his back, legs, feet, and groin. He is also having digestive issues as well as high blood pressure. For his digestive issues, he has had a physical examination. The doctor touched him for that examination.
>
> (*Id.* at pp. 3-4.)

The WCJ issued the F&O finding that defendant's denial of the panel qualified medical evaluation via telehealth format is unreasonable pursuant to emergency regulation section

46.2(a)(3)(C). The parties were ordered to proceed with a telehealth examination with Dr. Omrani pursuant to emergency regulation section 46.2.

DISCUSSION

I.

Defendant sought reconsideration of the F&O. The WCJ in his Report opined that the Petition should be treated as a petition for removal. 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 AOE/COE, 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.)[2] 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 F&O included a finding that applicant sustained an injury AOE/COE to the low back. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

II.

Although the F&O contains a finding that is final, defendant only challenges the WCJ's finding that defendant unreasonably denied a telehealth evaluation with the QME and order that

[2] All further statutory references are to the Labor Code unless otherwise stated.

the parties proceed with a telehealth evaluation with Dr. Omrani. This is an interlocutory decision regarding discovery and is subject to the removal standard rather than reconsideration pursuant to the discussion above. (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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

The State of California's Governor, Gavin Newsom, issued Executive Order N-33-20 on March 19, 2020, which required all Californians to stay home with certain limited exceptions.[3] On May 19, 2020, the Division of Workers' Compensation (DWC) announced emergency regulations for medical-legal evaluations effective from May 14, 2020.[4] Application of these regulations has been extended to March 12, 2021 as of the date of this decision.[5] As outlined by the DWC, these regulations concern how medical-legal evaluations may occur during this state of emergency as provided in section 46.2.[6] These regulations were approved by the State Office of Administrative Law (OAL) on May 14, 2020.[7]

Emergency regulation section 46.2 provides as follows in relevant part:

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[3] Governor Newsom's Executive Order N-33-20 may be accessed here: https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf. (See Evid. Code, § 452(c).)

[4] The DWC Newsline regarding these emergency regulations may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-43.html.

[5] The DWC Newsline regarding extension of these emergency regulations may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-90.html.

[6] The complete and final text of section 46.2 may be accessed here: https://www.dir.ca.gov/dwc/DWCPropRegs/2020/QME-Regulations/Final-Emergency-Regulations/Text-of-regulations-Telehealth.docx.

[7] The OAL's approval may be accessed here: https://www.dir.ca.gov/dwc/DWCPropRegs/2020/QME-Regulations/Final-Emergency-Regulations/Notice-of-Approval-1.pdf.

(a) During the period that this emergency regulation is in effect a QME, AME, or other medical-legal evaluation may be performed as follows:

…

(3) A QME or AME may complete a medical-legal evaluation through telehealth when a physical examination is not necessary and all of the following conditions are met:

(A) The injured worker is not required to travel outside of their immediate household to accomplish the telehealth evaluation; and

(B) There is a medical issue in dispute which involves whether or not the injury is AOE/COE (Arising Out of Employment / Course of Employment), or the physician is asked to address the termination of an injured worker's indemnity benefit payments or address a dispute regarding work restrictions; and

(C) There is agreement in writing to the telehealth evaluation by the injured worker, the carrier or employer, and the QME. Agreement to the telehealth evaluation cannot be unreasonably denied. If a party to the action believes that agreement to the telehealth evaluation has been unreasonably denied under this section, they may file an objection with the Workers' Compensation Appeals Board, along with a Declaration of Readiness to Proceed to set the matter for a hearing;

(D) The telehealth visit under the circumstances is consistent with appropriate and ethical medical practice, as determined by the QME; and

(E) The QME attests in writing that the evaluation does not require a physical exam.

(4) For purposes of evaluations pursuant to subdivision (3) of this emergency regulation, telehealth means remote visits via video-conferencing, video-calling, or similar such technology that allows each party to see the other via a video connection.

…

(e) Upon the lifting or termination of Governor Gavin Newsom's Executive Order N-33-20, and when there is no longer any stay-at-home order in the jurisdiction where the injured workers resides or evaluation will occur, QME evaluations may take place under the provisions of the non-emergency QME regulations (title 8 Cal. Code of Regs. Articles 3, 4 and 4.5) or via the emergency regulations while they are in effect.

(Cal. Code Regs., tit. 8, § 46.2(a)(3), (a)(4) and (e).)

Defendant contends that the elements of section 46.2(a)(3) have not been met in this matter and therefore, applicant is required to attend an in-person evaluation with Dr. Omrani. We

disagree.

First, the current record does not show that applicant must travel outside his immediate household in order to accomplish the telehealth evaluation. Defendant contends that applicant testified that he is unable to travel to California for an evaluation, but is willing to travel locally for testing so he should be required to attend an in-person evaluation in California. Dr. Omrani confirmed that he will conduct the evaluation via telehealth without a physical examination and did not state that applicant would be required to undergo testing in order to complete the evaluation. There is consequently no evidence in the record that he must travel even locally in order to accomplish the evaluation. (See *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be based on admitted evidence in the record].)[8]

Secondly, defendant contends that AOE/COE is not at issue because the lumbar spine has been accepted as compensable. Section 46.2(a)(3)(B) refers to a "medical issue in dispute which involves whether or not the injury is AOE/COE." Defendant has denied applicant's internal medicine complaints as not industrially caused, i.e., *there is a medical issue in dispute* regarding whether these conditions are AOE/COE. Defendant's acceptance of the low back as industrial does not obviate the disputed medical issue involving AOE/COE with respect to the internal medicine complaints.

There is no agreement between the parties to a telehealth evaluation per section 46.2(a)(3)(C) because defendant refuses to agree to this type of evaluation with Dr. Omrani. Applicant followed the required procedure of filing a DOR to have the issue addressed by the Appeals Board.

Dr. Omrani has confirmed that he will conduct a telehealth evaluation without a physical examination per section 46.2(a)(3)(D)-(E). It is presumed that Dr. Omrani would have advised the parties if he believed that a telehealth evaluation was inconsistent with appropriate and ethical medical practice under the circumstances.[9]

Defendant further contends that Labor Code section 4628(a) does not permit anyone other

[8] Moreover, a willingness to travel locally by car to undergo testing (if deemed necessary) is entirely different than a willingness to fly from Washington to California via airplane and stay in public lodging to attend the evaluation in person, which would necessitate substantially more exposure to other persons outside of applicant's household. Applicant has testified that there are medical conditions amongst members of his house that militate against the potentially extensive exposure required to attend an in-person evaluation in California.

[9] While additional commentary from Dr. Omrani may have been helpful, his response was not deficient.

than the QME to conduct the physical examination of applicant and applicant must be touched by Dr. Omrani as part of his evaluation because the internist who previously evaluated him also touched him. (Lab. Code, § 4628(a).)[10] As stated above, Dr. Omrani has stated that he will conduct a telehealth evaluation of applicant. Defendant's contention that Dr. Omrani must touch applicant as part of his evaluation is speculative and unsupported by Dr. Omrani's response. Additionally, section 4628(a) expressly permits parts of the examination to be conducted by "a nurse performing those functions routinely performed by a nurse, such as taking blood pressure." (*Id.*) Consequently, the statute allows for parts of the examination, including diagnostic studies, to be performed by another person provided those persons and their qualifications are identified per section 4628(b). Based on the current record, there is insufficient evidence to conclude that there are portions of the examination that must be performed by Dr. Omrani in person.

Furthermore, emergency regulation section 46.2(e) provides for QME evaluations to take place per the non-emergency provisions once Governor Newsom's Executive Order N-33-20 is lifted or terminated. In the event that Dr. Omrani determines following his telehealth visit that he is unable to address the disputed issues between the parties without a physical examination of applicant, the issue of whether an in-person evaluation is necessary in order to produce substantial medical evidence regarding these conditions may be revisited at an appropriate time.

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[10] Section 4628 provides as follows in relevant part:

> (a) Except as provided in subdivision (c), no person, other than the physician who signs the medical-legal report, except a nurse performing those functions routinely performed by a nurse, such as taking blood pressure, shall examine the injured employee or participate in the nonclerical preparation of the report, including all of the following:
>
> (1) Taking a complete history.
> (2) Reviewing and summarizing prior medical records.
> (3) Composing and drafting the conclusions of the report.
>
> (b) The report shall disclose the date when and location where the evaluation was performed; that the physician or physicians signing the report actually performed the evaluation; whether the evaluation performed and the time spent performing the evaluation was in compliance with the guidelines established by the administrative director pursuant to paragraph (5) of subdivision (j) of Section 139.2 or Section 5307.6 and shall disclose the name and qualifications of each person who performed any services in connection with the report, including diagnostic studies, other than its clerical preparation. If the report discloses that the evaluation performed or the time spent performing the evaluation was not in compliance with the guidelines established by the administrative director, the report shall explain, in detail, any variance and the reason or reasons therefor.
>
> (Lab. Code, § 4628(a)-(b).)

Defendant cites to panel decisions in support of its contention that a telehealth evaluation violates its right to due process. The panel decisions cited by defendant regarding telehealth evaluations were not governed by emergency regulation section 46.2. Moreover, those cases involved circumstances that did not include a global pandemic. We are in unprecedented times. It is acknowledged that all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) However, as recently stated by the Appeals Board in a significant panel decision: "Due process is the process that is due under the circumstances as we find them, not as we might wish them to be." (*Gao v. Chevron Corporation* (2021) 86 Cal.Comp.Cases 44, 48.)[11] As in *Gao*, emergency regulation section 46.2 seeks to strike a balance between preserving the integrity of the medical-legal evaluation process while also "protecting the public from real and significant harm, and the state's responsibilities under the California Constitution to provide efficient, timely resolution of disputes in order to secure benefits for eligible injured workers." (*Id.*)

Under the circumstances here, we agree with the WCJ that defendant unreasonably denied agreement to a telehealth evaluation per the emergency regulation. Applicant meets the elements of section 46.2(a)(3) for a telehealth QME evaluation for his internal medicine complaints. We decline to order him to risk his health and the health of his household, in addition to potentially other members of the public, to attend an in-person evaluation with Dr. Omrani.

In conclusion, defendant has not shown significant prejudice or irreparable harm by the order for a telehealth evaluation with the internal QME, nor has it shown that reconsideration will not be an adequate remedy if a final decision adverse to defendant ultimately issues.

We will therefore deny defendant's Petition for Reconsideration.

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[11] Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); see also Cal. Code Regs., tit. 8, §§ 10305(r), 10325(b).)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on November 16, 2020 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 9, 2021

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

GODFREY GODFREY LAMB & ORTEGA
KENNETH ROSENBROOK
ROSE KLEIN & MARIAS LLP

AI/*pc*

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