WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOHN DZAMBIK, *Applicant*

vs.

ISHAAN ENTERPRISE, INC.; MARKEL CORPORATION OF AMERICA, *Defendants*

Adjudication Number: ADJ12656490
Oakland District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

Applicant seeks reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration ("Opinion") issued by the Workers' Compensation Appeals Board ("Appeals Board") on November 4, 2021. In the Opinion, a split panel granted defendant's Petition for Reconsideration of the Findings of Fact, Order and Opinion on Decision issued by the workers' compensation administrative law judge (WCJ) on June 15, 2021. The majority found that applicant remains bound by the parties' agreement to use Dr. Daniel Shalom as an agreed medical evaluator (AME) in neurology and ordered the parties to continue with discovery with Dr. Shalom.

Applicant contends that defendant's Petition for Removal of the WCJ's decision was not verified and should have been dismissed. Applicant also contends that defendant did not meet the standard for granting removal of the WCJ's decision and the Appeals Board erred in finding that Labor Code[1] section 4062.2(f) precludes applicant from unilaterally withdrawing from the AME agreement. (Lab. Code, § 4062.2(f).)

We received an answer from defendant.

We have considered the allegations of applicant's Petition for Reconsideration and defendant's answer. Based on our review of the record and for the reasons outlined in the November 4, 2021 Opinion, which we adopt and incorporate, and as discussed below, we will deny applicant's Petition.

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

We do not reiterate the factual background, which is contained in the prior Opinion.

I.

Applicant sought reconsideration of the Opinion. 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 (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.) 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 Opinion includes a finding regarding injury AOE/COE. Injury AOE/COE is a threshold issue fundamental to the claim of benefits. Accordingly, the Opinion is a final order subject to reconsideration rather than removal.

II.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time

limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1108.) Applicant's Petition was timely filed on November 22, 2021. Our failure to act was due to a procedural error and our time to act on applicant's Petition was tolled.

III.

With respect to the lack of verification for defendant's Petition for Removal challenging the WCJ's decision, WCAB Rule 10510(d) provides in relevant part:

> All petitions and answers shall be verified under penalty of perjury in the manner required for verified pleadings in courts of record. **A failure to comply with the verification requirement constitutes a valid ground for summarily dismissing or denying a petition or summarily rejecting an answer.**
>
> (Cal. Code Regs., tit. 8, § 10510(d), emphasis added.)

The Rule's language provides that failure to comply with the verification requirement is a valid ground for summarily dismissing or denying a petition. However, the Rule does not *mandate* denial or dismissal of a petition that is filed without a verification. The Rule provides the Appeals Board with the discretion to summarily dismiss or deny a petition lacking a verification, but it does not require us to do so. Additionally, it is acknowledged that defendant filed an amended Petition for Removal on November 30, 2021 with the requisite verification. A petitioner may cure the defect of filing a petition without a verification by subsequently filing the verification. (See *Torres v. Contra Costa Schools Ins. Group* (2014) 79 Cal.Comp.Cases 1181 (Significant Panel Decision); *Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision).)

IV.

Although the Opinion contains a finding that is final, applicant is only challenging an interlocutory finding/order in the Opinion regarding whether he is bound by the AME agreement. Therefore, we will apply the removal standard to our review. (See *Gaona*, *supra*.)

Applicant makes a circular argument that the Opinion does not consider the entirety of section 4062.2 because it purportedly did not consider that section 4062.2(f) allows the parties to agree to an AME, but forbids a panel request where the parties have agreed to an AME. The Opinion concluded that "the parties forwent the QME panel request process per sections 4062 and 4062.2(b) when they agreed to submit the issue to an AME." (Opinion, November 4, 2021, p. 6.) Section 4062.2 provides the *required* process to obtain a medical-legal evaluation where the employee is represented by an attorney. (Lab. Code, § 4062.2(a) ["Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section."].) There are only two methods provided in section 4062.2 to obtain a medical-legal evaluation: through a party's request for a qualified medical evaluator (QME) panel or by an agreement between the parties to use an AME. These are either/or paths to medical-legal discovery. As discussed in the Opinion, the parties are precluded from requesting a QME panel if they have agreed to an AME. If the parties are not proceeding with a medical-legal evaluation with an AME, the only other avenue to obtain a medical-legal evaluation is through a QME panel. However, a party cannot request a panel if they have an AME agreement in place per section 4062.2(f) and the AME agreement may only be cancelled by mutual written consent. Trapping the parties in a discovery catch-22 is inconsistent with our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.)

We otherwise deny applicant's Petition for the reasons outlined in the November 4, 2021 Opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on November 4, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

I DISSENT. (See Attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 11, 2022

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

BRIAN THORNTON LAW
D'ANDRE LAW
JOHN DZAMBIK

AI/*pc*

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent per my previous dissenting opinion. I would grant applicant's Petition and reinstate the WCJ's June 15, 2021 Findings of Fact, Order and Opinion on Decision for the reasons outlined in my dissent.

Therefore, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 11, 2022

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

BRIAN THORNTON LAW
D'ANDRE LAW
JOHN DZAMBIK

AI/*pc*

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

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant sought removal of the Findings of Fact, Order and Opinion on Decision (F&O) issued by the workers' compensation administrative law judge (WCJ) on June 15, 2021.[1] By the F&O, the WCJ found that applicant's request to withdraw from the agreement to use Dr. Daniel Shalom as the agreed medical evaluator (AME) was in good faith and with sufficient advance notice to not cause prejudice to defendant. The WCJ further found that applicant's request to withdraw from the AME agreement did not violate Labor Code[2] section 4062.2(f) as it was made before Dr. Shalom evaluated applicant. (Lab. Code, § 4062.2(f).) It was ordered that applicant's request to withdraw from the AME agreement was granted.

Defendant contends that section 4062.2(f) precludes a party's unilateral withdrawal from an AME agreement and therefore, applicant may not unilaterally withdraw from the agreement to use Dr. Shalom as an AME.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny defendant's Petition.

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition as one seeking reconsideration, rescind the F&O and issue a new decision finding that applicant remains bound by the agreement to use Dr. Shalom as an AME in neurology. The parties will be ordered to proceed with discovery utilizing Dr. Shalom.

FACTUAL BACKGROUND

Applicant claims injury on August 21, 2019 to the head, shoulder, back, arm and psyche while employed as a driver/warehouse man by Ishaan Enterprise, Inc. The Application for Adjudication of Claim was filed by applicant's attorney on applicant's behalf.

Two orthopedic QME panels were issued in this matter to evaluate the orthopedic parts. (Applicant's Exhibit No. 2, PQME Panel Number One #7368318, October 21, 2020; Applicant's Exhibit No. 3, PQME Panel Number One #2637265, December 2, 2020.)

---

[1] As noted by the WCJ in his Report, defendant's Petition was timely filed, but not verified. Defendant is advised that failure to include verification with a petition may result in the petition's dismissal. (Cal. Code Regs., tit. 8, former § 10450(e), now § 10510(d) (eff. Jan. 1, 2020).)

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

On October 22, 2020, applicant sent an email to defendant stating: "Michael kassman [sic] for neuro?" (Defendant's Exhibit A, Emails between applicant attorney and defense attorney, October 23, 2020.) The following day, defendant's attorney emailed in response: "Here is the list. Let me know any you would agree to. Otherwise we could simply stipulate to a second panel in Neurology. As I understand Wayne Anderson is not serving as a QME anymore." (*Id*.) Applicant responded the same day by email saying "shalom?" (*Id*.) On October 29, 2020, defendant sent an email to applicant's attorney stating: "I have authority for Dr. Shalom as an AME in neurology." (Defendant's Exhibit B, Emails between applicant attorney and defense attorney, October 29, 2020.) Applicant responded that day by saying "Great." (*Id*.)

On October 30, 2020, applicant sent defendant an email stating: "Regarding Shalom upon further research we would not be agreeable for his services as an AME." (Applicant's Exhibit No. 5, Emails between applicant attorney and defense attorney, October 30, 2020, p. 2.) Defendant responded by saying: "Per the labor code you cannot rescind an AME agreement once made." (*Id.*)

On November 4, 2020, applicant sent another email to defendant saying: "Please be advised that applicant no longer agrees to Shalom after recent deposition." (Defendant's Exhibit C, Emails between applicant attorney and defense attorney, November 4-5, 2020.) Defendant responded the following day by saying in relevant part: "Unfortunately, the law does not support your client unilaterally withdrawing from an AME agreement. If he is not inclined to proceed with the evaluation we will file a petition to compel." (*Id.*)

The matter proceeded to trial on April 26, 2021 on the sole issue of enforcement of the AME agreement per section 4062.2(f). (Minutes of Hearing, April 26, 2021, p. 2.)

The WCJ issued the resulting F&O as outlined above.

DISCUSSION
I.

Defendant sought removal of the F&O. 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 (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.) 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 finding regarding injury AOE/COE. Injury AOE/COE is a threshold issue fundamental to the claim of benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

II.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (Id. at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (Shipley, supra, 7 Cal.App.4th at p. 1108.) Defendant's Petition was timely filed on July 7, 2021. Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

III.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory finding/order in the decision regarding whether applicant is bound by the AME agreement. Therefore, we will apply the removal standard to our review. (See *Gaona*, supra.)

Section 4062.2(f) provides as follows:

> The parties may agree to an agreed medical evaluator at any time, except as to issues subject to the independent medical review process established pursuant to Section 4610.5. **A panel shall not be requested pursuant to subdivision (b) on any issue that has been agreed to be submitted to or has been submitted to an agreed medical evaluator unless the agreement has been canceled by mutual written consent.**
>
> (Lab. Code, 4062.2(f), emphasis added.)

An agreement to an AME may be canceled by mutual written consent per section 4062.2(f). Here, only applicant wishes to withdraw from the agreement so there is no mutual consent between the parties to cancel the AME with Dr. Shalom. The statute does not provide for unilateral withdrawal from an AME agreement based on good cause or where the withdrawal will not result in prejudice to the other party. The Appeals Board is prohibited from adding provisions to the Labor Code and we decline to attempt to usurp the Legislature's role. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827 [courts may not add provisions to a statute]; see also *Peterson v. Employment Development Dept.* (1995) 60 Cal.Comp.Cases 1206, 1211 (Appeals Board en banc) ["[i]t is incumbent upon the judiciary and bodies whose purpose it is to interpret and apply legislation not to indulge in the legislative process themselves."].)

The panel decision in *Yarbrough v. Southern Glazer's Wine and Spirits* (2017) 83 Cal.Comp.Cases 425 [2017 Cal. Wrk. Comp. P.D. LEXIS 508] cited by applicant, the WCJ and the dissent ignores the language in section 4062.2(f) that a QME panel shall not be requested "on any issue that has been agreed to be submitted to" an AME. By its plain language, the statute precludes a QME panel request where either: 1) the parties have agreed to submit the issue to an AME **or** 2) the issue **has been** submitted to an AME. (See e.g*., People v. Loeun* (1997) 17 Cal.4th 1, 9-10, citing *White v. County of Sacramento* (1982) 31 Cal.3d 676 [the use of the disjunctive "or" in a statute indicates a legislative intent to designate alternative or separate categories including distinct ways to satisfy statutory requirements].) The panel in *Yarbrough* read this statutory language as permitting unilateral withdrawal from an AME agreement if no evaluation had taken place yet. This interpretation ignores the first part of the statutory subdivision contemplating solely an agreement to submit an issue to an AME, not actual submission of the issue to the AME. We disagree with *Yarbrough* to the extent it suggests a party may unilaterally withdraw from an

AME agreement because an evaluation has not yet taken place with the agreed upon physician.[3]

Applicant contends in his answer that there must be a dispute pursuant to section 4062(a) before proceeding with a medical-legal evaluation. (Lab. Code, § 4062(a).)[4] Section 4062(a) outlines the process to object to a medical determination by a treating physician in order to trigger the QME panel request process per section 4062.1 (unrepresented) or section 4062.2 (represented). (Lab. Code, §§ 4062.1, 4062.2.) Section 4062.2(f) permits the parties to agree to an AME "at any time" and expressly prohibits a QME panel request per section 4062.2(b) where the parties have already agreed to submit an issue to an AME. In other words, the parties forwent the QME panel request process per sections 4062 and 4062.2(b) when they agreed to submit the issue to an AME. Therefore, we will grant defendant's Petition as one seeking reconsideration, rescind the F&O and issue a new decision finding that applicant remains bound by the agreement to use Dr. Shalom as an AME in neurology. The parties will be ordered to proceed with discovery utilizing Dr. Shalom. The new decision will retain the parties' trial stipulation to injury AOE/COE to certain body parts. (See Lab. Code, § 5702; see also *County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].)

For the foregoing reasons,

IT IS **ORDERED** that defendant's Petition for Reconsideration of the Findings of Fact, Order and Opinion on Decision issued by the WCJ on June 15, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Order and

---

[3] 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].) We therefore are not bound by the *Yarbrough* panel decision, although we may consider it to the extent that we find its reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, 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].) For the reasons discussed herein, we find the reasoning of *Yarbrough* to be unpersuasive.

[4] Section 4062(a) provides as follows in its entirety:

> If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610, the objecting party shall notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented by an attorney or within 30 days of receipt of the report if the employee is not represented by an attorney. These time limits may be extended for good cause or by mutual agreement. If the employee is represented by an attorney, a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained. If the employee is not represented by an attorney, the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators, the evaluation shall be obtained as provided in Section 4062.1, and no other medical evaluation shall be obtained.

Opinion on Decision issued by the WCJ on June 15, 2021 is **RESCINDED** and is **SUBSTITUTED** with the following:

FINDINGS OF FACT

1. John Dzambik, while employed on August 21, 2019 as a driver/warehouse man, at Fremont, California, by Ishaan Enterprise, Inc., sustained injury arising out of and in the course of employment to the head, left shoulder and low back and claims injury arising out of and in the course of employment to the left arm and psyche.

2. Applicant remains bound by the parties' agreement to use Dr. Daniel Shalom as an agreed medical evaluator (AME) in neurology.

ORDER

IT IS ORDERED that the parties continue with discovery with Dr. Daniel Shalom as the AME in neurology.

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. I would deny defendant's Petition and affirm the WCJ's finding that applicant may withdraw from the agreement to the agreed medical evaluator (AME) per *Yarbrough v. Southern Glazer's Wine and Spirits* (2017) 83 Cal.Comp.Cases 425 [2017 Cal. Wrk. Comp. P.D. LEXIS 508]. As stated in *Yarbrough*:

> By its plain language, section 4062.2(f) deals only with withdrawal from an AME after submitting to an AME evaluation. Nothing in section 4062.2(f) precludes a party from withdrawing from an AME before submitting to an AME evaluation.
>
> (*Id*. at p. 428; see also Lab. Code, § 4062.2(f).)

Applicant in this matter wishes to withdraw from the agreement to use Dr. Shalom as an AME. The record reflects that the parties agreed to use Dr. Shalom as an AME in neurology, but no evaluation with Dr. Shalom had taken place before applicant withdrew from this agreement. There was only one day between the AME agreement and applicant's request to withdraw from it. Per the language of section 4062.2(f) and the analysis in Yarbrough, applicant should be permitted to withdraw from the agreement to an AME.

Therefore, I dissent.