WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RUBEN CEBALLOS, *Applicant*

vs.

ACCESS TO INDEPENDENCE OF SAN DIEGO; OAK RIVER INSURANCE COMPANY, c/o BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Numbers: ADJ12559747, ADJ12573699
San Diego District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 14, 2022.[1] By the F&O, the WCJ found in relevant part that defendant is not entitled to a replacement panel.

Defendant contends that it was improper for the WCJ to admit into evidence a letter from the qualified medical evaluator (QME) that was obtained after the mandatory settlement conference. Defendant also contends that the requirements for a telehealth evaluation per administrative director (AD) Rule 46.2 have not been met.

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 record and for the reasons discussed below, we will grant the Petition solely to amend the decision to include an order admitting applicant's exhibit number 3 into the record. We will otherwise affirm the WCJ's decision.

FACTUAL BACKGROUND

Applicant claims two injuries while employed as an independent living skilled coordinator

[1] The F&O was dated January 13, 2022, but was not served until January 14, 2022.

by Access to Independence of San Diego: 1) to the psyche, bilateral upper extremities, bilateral hands and fingers on August 17, 2018 (ADJ12573699) and 2) to the same body parts from December 1, 2017 through October 11, 2018 (ADJ12559747). The claims have been denied. (Minutes of Hearing, November 30, 2021, p. 2.)

The parties obtained a QME panel in psychology resulting in Dr. Shari Mednitsky as the selected QME. Although the report is not in evidence, Dr. Mednitsky apparently conducted an in person evaluation of applicant in 2019. (Defendant's Exhibit B, PQME form 31.5, February 9, 2021.) In 2020, defendant attempted to schedule a re-evaluation with Dr. Mednitsky per its December 10, 2020 letter to applicant:

> As you know, we attempted to schedule a reevaluation with the psychological panel QME, Dr. Shari Mednitsky, to take place on 11/12/2020. Dr. Mednitsky's office indicated that she was only willing to perform these evaluations through the telemedicine platform.
>
> Your client has indicated he is unwilling to move forward with an evaluation through the telemedicine platform thereby making Dr. Mednitsky unavailable.
>
> Please be advised that the defendants do hereby object to Dr. Mednitsky continuing as the psychological panel QME. It is the intent of the defendants to request a replacement panel QME list in the specialty of psychology absent written objection from your office citing good cause to the contrary.
>
> (Applicant's Exhibit No. 1, Correspondence objection to the Panel QME, December 10, 2020, p. 1.)

On February 9, 2021, defendant submitted a request for a replacement QME panel to the Medical Unit stating as follows in pertinent part:

> DR. MEDNITSKY EVALUATED THE APPLICANT ON 5/3/2019. THE PARTIES HAVE BEEN ATTEMPTING TO SCHEDULE A RE-EVALUATION WITH DR. MEDNITSKY SINCE 9/18/20. DR. MEDNISTSKY HAS INDICATED SINCE THAT TIME TO THE PRESENT THAT SHE WILL ONLY PERFORM THE RE-EVALUATION BY TELEMEDICINE. THE PARTIES ARE UABLE TO AGREE ON A RE-EVALUATION BY TELEMEDICINE AND THUS, DR. MEDNITSKY IS UNAVAILABLE/UNABLE TO SCHEDULE THE RE-EVALUATION. A REPLACEMENT PQME LIST IN THE SPECIALTY OF PSYCHOLOGY (PSY) IS RESPECTFULLY REQUEST [*sic*].
>
> (Defendant's Exhibit B, PQME form 31.5, February 9, 2021.)

Defendant also sent a letter to the Medical Unit with its replacement panel request:

> Since approximately September 2020, the parties have been attempting to schedule a re-evaluation with Dr. Mednitsky. However, the parties have been informed that Dr. Mednitsky is unwilling to physically re-evaluate the applicant, and would only perform a re-evaluation through telemedicine. Given the nature of this claim, the parties have been unable to reach an agreement for a re-evaluation through telemedicine. As recently as February 2021, Dr. Mednitsky's office continues to indicate that a re-evaluation can only occur through telemedicine.
>
> Based thereon, it appears that Dr. Mednitsky is unavailable. Furthermore, Dr. Mednitsky is unable to schedule a re-evaluation of Mr. Ceballos within the statutory time frame. Therefore, it is respectfully requested that a replacement panel QME list in the specialty of psychology (PSY) issue.
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> (Defendant's Exhibit A, Letter from defendant to the Medical Unit, February 17, 2021, pp. 1-2.)

Applicant filed a declaration of readiness to proceed (DOR) dated February 24, 2021. The DOR listed the issue as "PQME APPOINTMENT" and stated:

> DEFENDANTS WILL NOT CONSENT TO TELEMEDICINE PQME APPOINTMENT. ASSISTANCE OF WCAB NECESSARY TO RESOLVE DISPUTE.
>
> (DOR, February 24, 2021, p. 2.)

Defendant filed an objection to applicant's DOR on March 5, 2021.

On March 15, 2021, the Medical Unit issued a replacement QME panel in psychology per defendant's request. (Defendant's Exhibit C, Replacement PQME List Panel No. 2675237, March 15, 2021.) Defendant sent a letter to applicant dated March 24, 2021 with its strike of Dr. Randy Stotland from the replacement panel. (Defendant's Exhibit D, Letter from defendant to applicant's attorney, March 24, 2021.)

The matter proceeded to a mandatory settlement conference on July 19, 2021, at which time the parties prepared a pre-trial conference statement and set the matter for trial.

The trial proceeded on November 30, 2021 with the issues identified as attorney fees and the "validity of the replacement panel QME list." (Minutes of Hearing, November 30, 2021, p. 2.) At trial, applicant offered a letter from Dr. Mednitsky dated October 24, 2021 as his exhibit number 3. (*Id.*) Defendant objected to this exhibit on the following grounds:

1. Discovery should have closed and remained closed at the time of the Mandatory Settlement Conference, dated July 19, 2021.

2. The letter from the PQME was not signed under penalty of perjury and in violation of 139.3.

(*Id.* at p. 3.)

The WCJ deferred these objections and the matter was submitted for decision. (*Id.* at pp. 1 and 3.) The WCJ issued the resulting F&O as outlined above. The Opinion on Decision discusses admissibility of applicant's exhibit number 3:

> At the time of trial, Applicant sought to introduce correspondence from PQME Dr. Mednitsky dated October 24, 2021. Defendant objected to applicant's Exhibit 3 as this proposed exhibit was not previously identified at the time of the MSC. Thus, applicant proposed Exhibit 3 was marked for identification purposes only and the WCJ reserved decision on defendant's objection to proposed Exhibit 3.
>
> Having reviewed the entire evidentiary record presented by the parties, the workers' compensation law judge overrules defendant's objection to applicant proposed Exhibit 3. The MSC was held on July 19, 2021. Proposed Exhibit 3 is dated October 24, 2021, which is dated after the MSC. This Exhibit was not available at the time of the MSC and is relevant to the issue at hand. Although defendant asserts Applicant Exhibit 3 should be excluded, this is not gamesmanship and the purpose is to get to the truth of the matter.
>
> Here, Applicant Exhibit 3 is a letter from the PQME stating she is available for a tele-health visit. As such, the truth of the matter is that the PQME is available for a tele-health appointment. Thus, applicant's proposed Exhibit 3 is admitted into Evidence.
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> (Opinion on Decision, January 14, 2021, pp. 3-4.)

DISCUSSION

I.

Defendant sought reconsideration 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.)[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 claims injury AOE/COE while employed by defendant. Employment 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 it is not entitled to a replacement QME panel. 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, § 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).)

Defendant framed the issue in its Petition as whether the elements have been met for Dr. Mednitsky to conduct a telehealth evaluation. However, this was not how the issue was framed at

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

trial. The primary issue at trial was the "validity of the replacement QME panel." Defendant holds the burden of proof to show that the replacement QME panel it obtained was validly issued. (Lab. Code, § 5705 [the burden of proof rests upon the party holding the affirmative of the issue].)

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] Certain emergency regulations were extended several times. These regulations included a process in AD Rule 46.2 for how medical-legal evaluations may occur during the state of emergency.[5] AD Rule 46.2 was approved by the State Office of Administrative Law (OAL) on May 14, 2020[6] and was in effect at the time of the parties' dispute regarding a telehealth evaluation with the QME Dr. Mednitsky.[7]

AD Rule 46.2 provided as follows in relevant part:

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

[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. (See e.g., *California Correctional Peace Officers Assn. etc. v. Workers' Comp. Appeals Bd.* (*Martin*) (2022) 74 Cal.App.5th 525 [DWC newsline that hearings would be held telephonically constituted sufficient notice to the individual participants of the case].)

[5] The complete and final text of AD Rule 46.2 may be accessed here: https://www.dir.ca.gov/dwc/DWCPropRegs/2020/QME-Regulations/Final-Emergency-Regulations/Text-of-regulations-Telehealth.docx. (See Evid. Code, § 452(b).)

[6] 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. (See Evid. Code, § 452(c).)

[7] See https://www.dir.ca.gov/dwc/DWCPropRegs/2020/QME-Regulations/QME_Regs.htm regarding AD Rule 46.2. AD Rule 46.2 has since been replaced with AD Rule 46.3 per https://www.dir.ca.gov/dwc/DWCPropRegs/2021/QME-Regulations/Index.htm. (See Evid. Code, § 452(b).)

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), bold emphasis added.)

AD Rule 46.2 outlined the elements for a telehealth evaluation by a QME. Defendant contends that Dr. Mednitsky cannot conduct a telehealth evaluation in this matter because these elements were not met. Defendant essentially contends that the remedy if either party does not agree to a telehealth evaluation is to obtain a replacement QME panel from the Medical Unit. This is inconsistent with AD Rule 46.2(a)(3)(C), as well as with the Appeals Board's authority to decide discovery disputes, including with respect to disputes over QME panels. (See *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 662 [64 Cal.Comp.Cases 624], citing *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 ["section 5310 supports the conclusion that WCJs have authority to decide discovery disputes"]; see also *Porcello v. State of California Dept. of Corrections and Rehabilitation* (2020) 85 Cal.Comp.Cases 327 [2020 Cal. Wrk. Comp. P.D. LEXIS 9] [holding that the Appeals Board has jurisdiction to address a dispute regarding the

specialty of a QME panel and a party is not required to first present a specialty dispute to the Medical Unit].) AD Rule 46.2 expressly states that a party cannot unreasonably deny agreement to a telehealth evaluation and that, if a party unreasonably denies agreement to a telehealth evaluation, the remedy is to object with the Appeals Board and file a DOR. That is precisely what occurred here when applicant filed his DOR regarding the parties' dispute over a telehealth evaluation by the QME Dr. Mednitsky. The Rule does not provide for the remedy defendant sought in seeking a replacement panel from the Medical Unit in lieu of addressing the dispute before the Appeals Board.

Therefore, defendant was not entitled to seek a replacement QME panel due to a dispute regarding whether there was an unreasonable denial of an agreement to a telehealth evaluation.

III.

Defendant's February 17, 2021 letter to the Medical Unit also stated that a replacement panel was warranted because Dr. Mednitsky "is unable to schedule a re-evaluation of Mr. Ceballos within the statutory time frame." It is presumed that this refers to AD 31.5(a)(2), which permits a replacement QME panel as follows:

> A QME on the panel issued cannot schedule an examination for the employee within sixty (60) days of the initial request for an appointment, or if the 60 day scheduling limit has been waived pursuant to section 31.3(e) of Title 8 of the California Code of Regulations, the QME cannot schedule the examination within ninety (90) days of the date of the initial request for an appointment.
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> (Cal. Code Regs., tit. 8, § 31.5(a)(2).)

AD Rule 31.3(e) separately states:

> If a party with the legal right to schedule an appointment with a QME is unable to obtain an appointment with a selected QME within sixty (60) days of the date of the appointment request, that party may waive the right to a replacement in order to accept an appointment no more than ninety (90) days after the date of the party's initial appointment request. When the selected QME is unable to schedule the evaluation within ninety (90) days of the date of that party's initial appointment request, either party may report the unavailability of the QME and the Medical Director shall issue a replacement pursuant to section 31.5 of Title 8 of the California Code of Regulations upon request, unless both parties agree in writing to waive the ninety (90) day time limit for scheduling the initial evaluation.
>
> (Cal. Code Regs., tit. 8, § 31.3(e).)

Dr. Mednitsky has already evaluated applicant. The regulatory timeframe for scheduling appointments in AD Rule 31.5(a)(2) only applies to the *initial* appointment with the QME, not to a request for an appointment for a re-evaluation. (See *Cienfuegos v. Fountain Valley Sch. Dist.* (May 12, 2011, ADJ6640151) [2011 Cal. Wrk. Comp. P.D. LEXIS 206] [AD Rule 31.5(a)(2) only applies to initial requests for examination, not to requests for re-examination].)[8] Consequently, Dr. Mednitsky's purported failure to schedule a re-evaluation within the regulatory timeframe in AD Rule 31.5(a)(2) is not a valid basis for a replacement panel.

AD Rule 31.5(a) enumerates 16 circumstances under which a party may request a replacement QME panel. (Cal. Code Regs., tit. 8, § 31.5(a).) Defendant has not shown entitlement to a replacement QME panel pursuant to any of the circumstances outlined in AD Rule 31.5. Thus, the WCJ correctly found that defendant is not entitled to a replacement panel.

IV.

It is acknowledged that discovery typically closes at the mandatory settlement conference and that evidence obtained thereafter "shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." (Lab. Code, § 5502(d)(3).) Defendant contends that it was improper for the WCJ to admit Dr. Mednitsky's October 24, 2021 letter as one of applicant's exhibits because this letter was obtained after the July 19, 2021 mandatory settlement conference.

The WCJ explained in his Opinion on Decision the rationale for permitting this exhibit into evidence over defendant's objection. Although additional discovery following a mandatory settlement conference is generally prohibited absent certain circumstances, the WCJ acted within his discretion in determining whether this letter could have been obtained prior to the hearing and to consider all of the evidence he deemed relevant to decide the case on the merits. (See Lab. Code, §§ 5708, 5709.) However, there is no actual order in the F&O stating that this proffered exhibit was admitted as evidence. While the Opinion on Decision provides the rationale for the F&O, the actual findings of fact and orders must be contained in the F&O. (Lab. Code, § 5313.)

[8] 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].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (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].) Here, we refer to *Cienfuegos* because it considered a similar issue.

In order to create a clear record regarding which exhibits are in evidence, we will amend the F&O solely to include an order that this exhibit is admitted over defendant's objection.

We emphasize that Dr. Mednitsky's letter did not impact our analysis above regarding the validity of the replacement QME panel. We are simply clarifying the record that it is in evidence. The outcome here would be the same regardless of whether this letter is part of the evidentiary record or not.

Therefore, we will grant reconsideration and amend the F&O solely to include an order admitting applicant's exhibit number 3 into evidence. We otherwise affirm the F&O.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on January 14, 2022 is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on January 14, 2022 is **AFFIRMED**, except that it is **AMENDED** to add the following:

ORDER

IT IS ORDERED that applicant's exhibit number 3 is admitted into the record over defendant's objection.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 4, 2022

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

HEWGILL COBB & LOCKARD
GOLDMAN MAGDALIN & KRIKES
RUBEN CEBALLOS

AI/*pc*

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