WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GUS KOWAL, *Applicant*

vs.

COUNTY OF LOS ANGELES, permissibly self-insured, *Defendants*

Adjudication Number: ADJ12372302
Marina Del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal or in the alternative reconsideration of the Stipulations/Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 4, 2022. By the F&O, the WCJ found that applicant cannot set an examination with the qualified medical evaluator (QME) he untimely struck when the remaining doctor was not able to see applicant "within the statutory period."

Applicant contends that his panel strike was void ab initio since it was untimely and he was therefore permitted to schedule an appointment with the doctor he struck.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Applicant's Petition for Removal/Reconsideration (Report) recommending that applicant's Petition be denied.

We have considered the allegations of applicant's Petition for Removal and/or Reconsideration, defendant'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 applicant's Petition as one seeking reconsideration, rescind the F&O and issue a new decision finding that applicant was permitted to schedule an examination with the doctor that he untimely struck. The parties will be ordered to proceed with the existing QME panel.

FACTUAL BACKGROUND

Applicant claims two injuries while employed as a roofer by the County of Los Angeles:

1) to the upper extremity, bilateral shoulders, bilateral hands, back, neck, abdominal wall strain, skin cancer, migraines, hypertension, anxiety, tuberculosis and kidney damage through January 22, 2018 (ADJ11406279); and 2) to the right shoulder, migraines, low back, psyche and left shoulder through February 28, 2012 (ADJ12372302).

On August 5, 2019, defendant sent to applicant a Notice of Denial of Claim for Workers' Compensation Benefit citing "02/28/2012" as the "DOI." (Applicant's Exhibit No. 3, Denial letter, August 5, 2019, p. 1.)

On October 11, 2019, applicant requested and obtained a QME panel in orthopedic surgery for the 2012 cumulative trauma claim. (Applicant's Exhibit No. 1, DWC Panel 7289118, October 11, 2019.)

On October 16, 2019, defendant sent applicant a letter objecting to panel number 7289118, but striking Dr. Robert Kolesnik from the panel as a precaution. (Defendant's Exhibit E, Letter from Fuller Law Group, October 16, 2019.)

On October 29, 2019, applicant sent a fax to defendant with his strike of Dr. Hananni from panel number 7289118. (Applicant's Exhibit No. 2, Applicant's attorney's strike letter, October 29, 2019.) Applicant subsequently sent a letter approximately a year later on October 8, 2020 to defendant advising that an appointment had been scheduled for December 8, 2020 with Dr. Hananni to conduct the QME evaluation. (Defendant's Exhibit B, Letter from Berkowitz & Cohen, October 8, 2020.) Defendant sent applicant a letter objecting to the evaluation with Dr. Hananni since applicant had previously struck this physician from the panel. (Defendant's Exhibit F, Letter from Fuller Law Group, October 19, 2020.)

The matter initially proceeded to trial on August 31, 2021 on whether applicant was entitled to a new QME panel in ADJ12372302 and if applicant could set an examination with the doctor he untimely struck where "the remaining doctor was not able to see Applicant within the statutory time period." (Minutes of Hearing, August 31, 2021, p. 2.)

The WCJ issued a Findings and Order dated September 13, 2021 finding that applicant was not entitled to a panel in ADJ12372302 and the second issue at trial regarding applicant's panel strike was moot.

Applicant sought removal or in the alternative reconsideration of the September 13, 2021 Findings and Order. In our November 16, 2021 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Opinion), we granted applicant's Petition,

rescinded the September 13, 2021 Findings and Order and found that applicant was entitled to another QME panel for the 2012 cumulative trauma injury. The matter was returned to the trial level for the WCJ to determine if applicant was permitted to schedule an exam with the QME he untimely struck.

Defendant filed a petition for writ of review of the November 16, 2021 Opinion with the Court of Appeal. On April 12, 2022, the Court of Appeal dismissed defendant's petition because there was no final decision or award by the Appeals Board.

Upon return to the trial level, the matter again proceeded to trial on March 1, 2022 on the following issue:

> 1. Can applicant set a panel exam with a doctor they untimely struck when, after defendants timely struck, the remaining doctor was not able to see applicant within the statutory time period?
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> (Minutes of Hearing (Further), March 1, 2022, p. 2.)

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

DISCUSSION

I.

Applicant sought reconsideration or in the alternative 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.)[1] 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

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

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 that applicant "while employed from January 1, 2008 to February 28, 2012" claims injury AOE/COE. Employment 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.

Although the decision contains a finding that is final, applicant is only challenging an interlocutory finding/order regarding whether he was permitted to schedule an appointment with the QME he untimely struck who could not schedule an examination within the required period. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Removal is discretionary and is generally employed only as an extraordinary remedy which must be denied absent a showing of significant prejudice or irreparable harm, or that reconsideration will not be an adequate remedy after issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133].)

Section 4062.2 provides the procedure to obtain a QME panel if the employee is represented by an attorney. (Lab. Code, § 4062.2.) Pursuant to section 4062.2(c), each party has ten days from assignment of a QME panel to strike one member of the panel. (Lab. Code, § 4062.2(c); see also *Razo v. Las Posas Country Club* (February 7, 2014, ADJ8381652) [2014 Cal. Wrk. Comp. P.D. LEXIS 12] [period to strike under section 4062.2(c) is extended by five days for mailing][2].)

[2] 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).)

In this matter, panel number 7289118 issued on October 11, 2019. Defendant made a timely strike from the panel on October 16, 2019. Applicant sent a letter striking Dr. Hannani from the panel on October 29, 2019. Even accounting for additional time for mailing, applicant's strike from the panel was untimely and invalid. Thus, both remaining doctors on the panel remained viable choices as the QME.

The WCJ concluded that applicant was precluded from scheduling an appointment with Dr. Hannani because his strike was untimely and Dr. Hannani could not schedule an appointment "within the statutory time period."

Section 4062.2(d) provides that the employee is "responsible for arranging the appointment for the examination, but upon his or her failure to inform the employer of the appointment within 10 days after the medical evaluator has been selected, the employer may arrange the appointment and notify the employee of the arrangements." (Lab. Code, § 4062.2(d).) Administrative Director (AD) Rule 31.3 provides the procedure(s) for parties to schedule an appointment with the QME. AD Rule 31.3 specifies as follows in relevant part:

> (d) Whenever the employee is represented by an attorney and the parties have completed the striking processes described in Labor Code section 4062.2(c), the represented employee shall schedule the appointment with the physician selected from the QME panel. If the represented employee fails to do so within ten (10) business days of the date a QME is selected from the panel, the claims administrator or administrator's attorney may arrange the appointment and notify the employee and employee's attorney.
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> (e) **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.**
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> (Cal. Code Regs., tit. 8, § 31.3(d)-(e), emphasis added.)

Separately, AD Rule 31.5(a) enumerates the circumstances under which a party may request a replacement QME panel. (Cal. Code Regs., tit. 8, § 31.5(a).) This includes the following:

> 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).)

If an employee is represented by an attorney, the employee has the exclusive right to schedule an appointment with the last remaining QME during the ten business days after both parties have made their respective strikes pursuant to section 4062.2(d) and AD Rule 31.3(d). During those ten business days, only the employee has the legal right to schedule an appointment with the QME.

However, once those ten days expire, either party may schedule an appointment with the QME. If the employee does not exercise their exclusive right to schedule an appointment within the ten days after the QME is selected, both parties concurrently hold the legal right to schedule an appointment with the QME once that initial period has expired. In an en banc decision, the Appeals Board noted in a footnote that if the employee fails to schedule an appointment with the QME within ten business days, "*the clock stops running and either party has an indefinite time to schedule the appointment.*" (*Cervantes v. El Aguila Food Products, Inc.* (2009) 74 Cal.Comp.Cases 1336, 1348, fn. 11 (Appeals Board en banc), emphasis in original.)[3] Therefore, after that initial 10-day period, the employee may still schedule the appointment, **or** the appointment may be scheduled by the claims administrator or the claims administrator's attorney pursuant to AD Rule 31.3(d).

As stated above, AD Rule 31.3(e) specifies that if a party with the legal right to schedule an appointment with a QME is unable to obtain an appointment with the QME within 60 days 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." This specific language reflects that if the party scheduling the appointment has a legal right to schedule the appointment, *that* party may waive the 60-day requirement and accept an appointment within 90 days of the appointment request. There is nothing in AD Rule 31.3(e) to

[3] The *Cervantes* decision issued under a previous version of section 4062.2(d) that was identical to most of the current version with the only change being the addition of the last sentence to this subsection. (Former Lab. Code, § 4062.2(d) added by Stats 2004, ch. 34, § 18, eff. Apr. 19, 2004.) The language of AD Rule 31.3(d) was also substantially similar at the time of *Cervantes*. AD Rule 31.3(e) was added to the Rules subsequent to *Cervantes* in 2013.

indicate that a replacement panel is required where the scheduling party has waived the 60-day requirement and accepted an appointment within 90 days of their request.

In fact, AD Rule 31.3(e) further states that if the QME cannot schedule an appointment within **90 days** of the initial appointment request, "*either party* may report the unavailability of the QME and the Medical Director shall issue a replacement" panel. The Medical Director must therefore issue a replacement panel in response to *either party's* request if the QME is unable to schedule an appointment within **90 days** from the date of the initial appointment request "unless *both parties* agree in writing to waive the ninety (90) day time limit for scheduling the initial evaluation." The lack of any similar language that both parties must agree to waiver of the 60-day requirement indicates a distinction in how the Rules treat the situation where an appointment may not be scheduled within 60 days, but can be scheduled within 90 days by the scheduling party. The language of AD Rule 31.3(e) consequently provides the scheduling party with a unilateral right to waive the 60-day requirement and accept an appointment within 90 days. It is only if the selected QME cannot schedule an appointment within 90 days that the scheduling party must seek agreement from the non-scheduling party to accept that appointment date. The non-scheduling party may not seek a replacement QME panel under AD Rule 31.5(a)(2) if the scheduling party has waived the 60-day requirement and accepted an appointment within 90 days of the date of the initial appointment request.

It is acknowledged that this is a unique set of facts since applicant scheduled an appointment with the physician he attempted to strike from the panel. His strike was untimely per the discussion above. Both parties had the right to schedule an appointment with the two remaining physicians on the panel and applicant chose to exercise that right by accepting an appointment with Dr. Hannani within 90 days of his appointment request.

Therefore, we will rescind the F&O and issue a new decision finding that applicant was permitted to schedule an examination with the doctor that he untimely struck. The parties will be ordered to proceed with using the existing panel.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Stipulations/Findings and Order issued by the WCJ on March 4, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Stipulations/Findings and Order issued by the WCJ on March 4, 2022 is **RESCINDED** and is **SUBSTITUTED** with the following:

FINDINGS OF FACT

1. Gus Kowal, while employed from January 1, 2008 to February 28, 2012 as currently pled, as a roofer, at Los Angeles, California, by the County of Los Angeles claims injury arising out of and in the course of employment to the right shoulder, migraines/headaches, low back, psyche and left shoulder.

2. At the time of the injury, the employer was permissibly self-insured.

3. The employer has furnished some medical treatment.

4. No attorney fees have been paid, and no attorney fee arrangements have been made.

5. Applicant can set a panel examination with the doctor he untimely struck when the remaining doctor was able to see applicant within 90 days.

ORDER

IT IS ORDERED that the parties proceed with utilizing panel number 7289118.

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

May 3, 2022

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

BERKOWITZ & COHEN
FULLER LAW GROUP
GUS KOWAL

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