**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**SALVADOR ZAMORA, *Applicant***

**vs.**

**HOSPITALITY STAFFING SOLUTIONS;**
**ACE AMERICAN INSURANCE COMPANY; ESIS, *Defendants***

**Adjudication Numbers: ADJ9958896, ADJ10920695**
**Los Angeles District Office**

# OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Amended Finding & Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on November 27, 2023. The WCJ found in relevant part that while employed by defendant from July 12, 2014 to July 12, 2015 (Case # ADJ9958896) and on April 12, 2014 (Case # ADJ10920695), applicant "was presumed to have sustained injury" arising out of and occurring in the course of employment (AOE/COE) to his arms, elbow, wrists, shoulders, knees, neck, hips, low back, spine, psyche, sexual dysfunction, sleep disorder, internal, and diabetes; that "the Presumption of injury to arms, elbow, wrists, shoulders, knees, neck, hips, low back, spine is rebutted by the reporting of Dr. Santaniello"; and that "the record requires further development regarding the issue of presumed disability regarding sexual dysfunction, sleep disorder, internal complaints and diabetes."

Applicant contends that the reporting of the Qualified Medical Evaluator (QME) John Santaniello, M.D., should be precluded as it is evidence obtainable within 90 days under Labor Code section 5402[1]; and that alternatively, the reporting supports a finding of industrial causation.

We did not receive an answer from defendant.

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

We received a Report and Recommendation on the Petition for Reconsideration (Report) from the WCJ, which recommends that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record, and as discussed below, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the Presiding WCJ for reassignment to a new WCJ for further proceedings consistent with this decision[2].

PROCEDURAL BACKGROUND

On January 6, 2022, the parties proceeded to trial on the issue of "Labor Code section 5402, the presumption of injury."

On February 16, 2022, the WCJ issued a Findings & Award in Case # ADJ9958896, finding that while employed by defendant as a houseman during the period from July 12, 2014 to July 12, 2015, applicant is presumed to have sustained injury AOE/COE to his arms, elbow, wrists, shoulders, knees, neck, hips, low back, spine, psyche, sexual dysfunction, sleep disorder, internal, and diabetes. None of the parties sought review of the Findings & Award.

On November 2, 2022, the parties returned to trial. The cases were consolidated. The issues raised were: "1. Presumption of liability and if this presumption has been rebutted by the PQME finding; 2. AOE/COE; 3. Parts of body injured."

DISCUSSION

Section 5402(b)(1) states that:

> If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.

In *Welcher*, the Court concluded that: "the rebuttable presumption of Labor Code section 5402 was intended to affect the burden of proof . . . because it was created by the Legislature to implement the public policy of expediting workers' compensation claims. As such, once the underlying facts have been established, its effect in workers' compensation litigation is to place upon the defendant employer/carrier the burden of proving the employee/applicant does not have a compensable injury; in the absence of such proof, the consequences are adverse to the employer/carrier." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Welcher*) (1995) 37

[2] Commissioner Dodd, who was on the panel that issued the prior order is not presently available to participate in the matter. Another panel member has been assigned in her place.

Cal.App.4th 675, 682-683 [60 Cal.Comp.Cases 717].) Here, the WCJ found on February 16, 2022 that applicant had established that the presumption applied to applicant's cumulative injury case. Once it is established that an applicant has met their burden to show that the presumption applies, defendant has the burden to produce evidence to dispute injury AOE/COE with evidence that was discovered subsequent to the 90-day period. At trial on January 6, 2022, defendant did not produce any evidence to dispute injury AOE/COE, and it did not seek to defer the issue of its burden. Accordingly, as explained below, the February 16, 2022 order was a final, threshold order, and defendant was required to seek review at that time.

A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd*. (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.)

In *Maranian supra*, a case similar to the case before us because it involved the issue of whether a finding that the presumption applied under section 5402(b) was a final order, the Court stated that:

> A "final order" for purposes of section 5900 includes any order which settles, for purposes of the compensation proceeding, an issue critical to the claim for benefits, whether or not it resolves all the issues in the proceeding or represents a decision on the right to benefits. (Citations omitted.)
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> . . . A threshold issue is an issue that is basic to the establishment of the employee's rights to benefits, such as the territorial jurisdiction of the Board, the existence of the employment relationship, and statute of limitations issues. Likewise, the term final order' includes orders dismissing a party, rejecting an affirmative defense, granting commutation, terminating liability, and determining whether the employer has provided compensation coverage." (Citations omitted.)
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> The characterization of an order as final and therefore susceptible to Board reconsideration has critical consequences. For example, the failure of the aggrieved party to petition timely for reconsideration of such an order bars later challenge to the propriety of the order before the WCAB or before the courts. (Citations omitted.) Also, the failure of the aggrieved party to raise in the petition for reconsideration a particular ""objection[], irregularit[y], [or] illegalit[y]" waives the issue forever and the party may not present it in a subsequent petition to the WCAB or in a petition to the court under section 5950. (Citations omitted.)

(*Maranian supra*, 81 Cal.App.4th at pp. 1070, 1075.)

Here, defendant did not seek review of the final order that found a presumption of injury to the listed body parts in applicant's cumulative injury case. That means that once the period expired to seek review, the findings of injury were final, and defendant was obligated to provide the benefits owed at that time. The very purpose of section 5402(b), prompt delivery of benefits, would be thwarted if a defendant could indefinitely delay on its burden to rebut, or if a defendant was able to stop providing benefits at some later date after providing them when a presumption was found. This does not mean that defendant cannot muster evidence to challenge injury to a particular body part or to the extent of disability due to the injury, but defendant cannot dispute AOE/COE in applicant's cumulative injury claim.

In his Petition, applicant raises the issue of the dates of the cumulative injury period. We observe that cumulative injury is defined under section 3208.1, and that the period is properly pled

up to the last date of hazardous exposure, and that the one-year period is part of the liability consideration under section 5500.5. Upon return, the dates of the cumulative injury period should be clarified.

We note that a similar finding as to the presumption was not made or adjudicated in applicant's specific injury case. To the extent that the WCJ made a finding as to a presumption for the specific injury when he issued his decision on November 27, 2023, that finding was incorrect.

Accordingly, we grant the Petition and rescind the decision. We note that no testimony has been taken in these cases. Given the tangled history of these cases, we conclude that the parties would be better served by a re-assignment to a new WCJ. (Lab. Code, §§ 5300, 5301, 5708.) Therefore, we return the matter to the PWCJ for re-assignment as to another WCJ. (Cal. Code Regs., tit. 8, § 10346(a).)

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Amended Findings & Order issued by the WCJ on November 27, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Amended Findings & Order issued on November 27, 2023 is **RESCINDED**.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the Presiding WCJ for assignment to another WCJ for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 2, 2024**

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

**SALVADOR ZAMORA**
**SOLOV AND TEITELL, A.P.C.**
**ALBERT & MACKENZIE**

**AS/mc**

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