WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN GUZMAN, *Applicant*

vs.

**TASHA OFF PRICE, INC.;
OAK RIVER INSURANCE COMPANY DBA BERKSHIRE HATHAWAY HOMESTATE COMPANIES; TECHNOLOGY INSURANCE COMPANY ADMINISTERED BY AMTRUST, *Defendants***

Adjudication Number: ADJ12629307
Los Angeles District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR REMOVAL

Defendant seeks reconsideration of the Opinion and Decision After Reconsideration (Opinion) issued by the Appeals Board on March 4, 2022. Our prior Opinion granted applicant's Petition for Reconsideration, rescinded the November 22, 2021 Findings and Order, and returned the matter to trial level for development of the record. We held that the medical record was inconsistent as to the nature of the injury and required development, that the Findings and Order failed to make specific findings responsive to the issues raised by the parties, and that the WCJ needed to address various evidentiary issues, including whether the pleadings should be conformed to proof.

Defendant's Petition for Reconsideration (Petition) contends that our Opinion disregarded the credibility determination of the WCJ without evidence of considerable substantiality, and further contends the evidence supports the WCJ's finding that compensation is barred by the post-termination defense of Labor Code section 3600(a)(10).[1]

We have not received an answer from any party.

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

We have reviewed the Petition, and we have reviewed the record in this matter. Based on our review of the record, for the reasons set forth in our prior Opinion, which we hereby adopt and incorporate, and for the reasons discussed below, we will dismiss the petition for reconsideration, treat the petition as seeking removal, and deny removal.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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, orders for development of the record. (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122]; *Elshami v. C&A Restaurants, Inc.* (October 18, 2019, ADJ11225851) [2019 Cal. Wrk. Comp. P.D. LEXIS 390].)

Here, our Opinion returned the matter to the trial level for further proceedings and for development of the record. The decision did not determine any substantive right or liability and did not determine a threshold issue. Accordingly, the Opinion is not a "final" decision and the petition will be dismissed to the extent it seeks reconsideration.

We will also deny the petition to the extent it seeks removal. 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 substantial 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 contends our Opinion impermissibly disregards the credibility findings made by the WCJ at trial. Defendant asserts that, "the appeals board is not allowed to disregard findings of credibility from the WCJ where there is no contrary evidence of considerable substantiality—and when there is none—the appeals board must affirm the "take nothing" from trial." (Petition, at 7:18.) Defendant asserts that where the WCJ finds applicant not credible, and in the absence of substantial evidence to the contrary, it is axiomatic that the WCAB must affirm a finding of no injury. (*Id*. at 9:12.)

We disagree. The Appeals Board is the ultimate finder of fact. (Lab. Code, §§ 5907, 5953.) On reconsideration, "the board is empowered to resolve conflicts in the evidence [citations], to make its own credibility determinations [citations], and … to reject the findings of the [WCJ] and enter its own findings on the basis of its review of the record." (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; accord: *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280–281 [39 Cal.Comp.Cases 310].) On reconsideration, the Appeals Board has "considerable discretion" and "enjoys broad authority" (*Redner v. Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 83, 92 [36 Cal.Comp.Cases 371]) and it can "redetermine the case upon the existing record" and take a "different view of the same evidence" than the WCJ. (*Argonaut Ins. Exchange v. Industrial Acc. Com. (Bellinger)* (1958) 49 Cal.2d 706, 709–712 [23 Cal.Comp.Cases 34].)

Notwithstanding the Board's broad powers to enter its own findings based on a review of the entire record, the defendant's argument erroneously proceeds from the assumption that we have disregarded the WCJ's credibility determinations. We have not. Rather, we have determined that the evidentiary record requires development because a decision on the number and nature of injuries must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); See *Lamb v. Workmen's Comp. Appeals Bd., supra,* 11 Cal.3d 274, 281; *Garza v. Workmen's Comp. Appeals Bd., supra,* 3 Cal.3d 312, 317; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) As we explained in our March 4, 2022 Opinion, both primary treating physician (PTP) Dr. Salomon and Qualified Medical Evaluator (QME) Dr. Becker have identified injury as arising out of an in the course of employment (AOE/COE). (Opinion, at pp. 2-3.) However, there is not agreement as to the mechanism of injury.

(*Ibid.*) Additionally, the WCJ determined that neither physician was provided a complete medical or vocational history. (Opinion on Decision, pp. 4-5; see *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (en banc); *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) Accordingly, we concluded the record must be developed, to allow for a full adjudication of the contested issues in this matter, including injury AOE/COE. It is well established that the WCAB, "may act to develop the record with new evidence if, for example, it concludes that *neither side* has presented substantial evidence on which a decision could be based." (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd. (McKernan)* 74 Cal.App.4th 928 (64 Cal. Comp. Cases 986); see also *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 (63 Cal.Comp.Cases 261) [lack of substantial medical evidence on issue in dispute supported development of record]; *M/A Com-Phi v. Workers' Comp, Appeals Bd. (Sevadjian)* (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 821] [appropriate to develop record lacking competent medical evidence].)

Once the record has been appropriately developed to include competent medical evidence, the court may weigh the *totality* of the evidence, including the WCJ's credibility determinations, in arriving at a final decision. "[A]lthough the board is empowered to resolve conflicts in the evidence [citations], to make its own credibility determinations [citations], and upon reconsideration to reject the findings of the [WCJ] and enter its own findings on the basis of its review of the record [citations], nevertheless, any award, order or decision of the board must be supported by substantial evidence in the light of the *entire* record." (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310].) Because defendant's Petition conflates the WCJ's credibility determination with a complete record based on substantial evidence, we are not persuaded that our prior opinion was in error. Nor does defendant raise, address, or establish that it will suffer irreparable harm or undue prejudice in the development of the record.

Defendant also asserts that compensation is barred by section 3600(a)(10). Defendant contends, "applicant failed to meet any exception under Labor Code § 3600(a)(10) and his claim was found to be retaliatory which is prohibited as a matter of public policy, and applicant should 'take nothing' on his claim." (Petition, at 14:1.)

Our Opinion observed that the Findings and Order contained no specific findings of fact responsive to the post-termination defense. (Opinion at p. 11.) Defendant contends "[t]he Opinion

on Decision may not have gone through Labor Code § 3600(a)(10) and its various exceptions in a line-by-line format, but the analysis was still present—and adequate—to support the F&O that there was no injury AOE/COE."[2] (Petition at 14:23.) However, and contrary to defendant's contention, section 5313 and *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc), require the WCJ to make and file findings upon all facts involved in the controversy." (*Hamilton*, at 476.) The WCJ made no findings necessary to the post-termination defense, including the date of injury, or whether and when the claim was reported. The analysis of the affirmative post-termination defense was effectively obviated by the determination that applicant sustained no injury AOE/COE. In light of our determination that the record requires development, the WCJ's finding that applicant did not sustain injury AOE/COE cannot supplant the requisite analysis of the post-termination defense and its attendant exceptions as required by section 5313 and *Hamilton*, *supra*. The evidence is not clear as to the nature of the injury claimed, and development of the record will be required prior to a determination of the post-termination defense.

In summary, our order for development of the record is not a final order, because it does not determine any substantive right or liability of those involved in the case, or determine a "threshold" issue that is fundamental to the claim for benefits. We deny the petition as a petition for reconsideration, accordingly. We further deny the petition as seeking removal, for failure to raise or demonstrate why defendant would sustain irreparable harm or undue prejudice, or why reconsideration would not be an adequate remedy following development of the record. (Lab. Code § 5900; Cal. Code Regs., tit. 8, § 10955.)

[2] Defendant's Petition also presented a direct request that the WCJ, "issue an 'amended order, decision or award' that comports with Rules and Regulations of the Appeals Board, and the requirements of the Labor Code. In this way, justice will be served." (Petition, at 13:24.) This request appears incongruent with defendant's assertions that the record is sufficient and otherwise complies with *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc). (Petition, at 12:6; 14:23.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 23, 2022

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

JUAN GUZMAN
LAW OFFICES OF LEVIN NALBANDYAN
LAW OFFICES OF HARRIGAN POLAN KAPLAN AND BOLDY
LLARENA MURDOCK LOPEZ & AZIZAD

SAR/abs

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