WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SELENE BARUCH MARTINEZ ALCANTARA (deceased), ***Applicant***

vs.

KELLOGG COMPANY, permissibly self-insured;
administered by CORVEL CORPORATION, ***Defendant***

Adjudication Number: ADJ7651912
Pomona District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration[1] on September 8, 2023 pursuant to Labor Code[2] section 5906, for further consideration of the factual and legal issues presented therein "on the basis of the evidence previously submitted in the case." (Lab. Code, § 5906; *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 13-15 [88 Cal.Comp.Cases 769].) Our order granting applicant's Petition for Reconsideration was not a final order subject to writ of review, and our final decision was deferred. (Lab. Code, § 5950 et seq.; see *Earley, supra,* 94 Cal.App.5th at pp. 13-15.) This is our final decision on the merits of applicant's Petition for Reconsideration.

Applicant sought reconsideration of the Findings of Fact (Findings) issued on June 19, 2023 by a workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that decedent sustained compensable injury to the lumbar spine; that temporary total disability (TTD) was paid at the weekly rate of $486.57 for the period November 11, 2010 to November 12, 2012; that permanent disability advances (PDA) were paid for the period November 13, 2012 to September 3, 2015; that applicant's objections to the close of discovery under section 5502, subdivision (d)(3), were overruled; applicant is barred from seeking cross-examination deposition

[1] Commissioner Dodd, who was previously a member of this panel is not currently available. Another panelist has been substituted in her place.

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

testimony of QME Drs. Chandran [orthopedic Panel Qualified Medical Evaluator (QME) Rama Chandran, M.D.] and Yousefi [internal QME Keyvan Yousefi, M.D.] by the equitable doctrine of laches; decedent's permanent and stationary (P&S) date was March 23, 2015 based on the reporting of the psychiatric QME Samuel Miles, M.D.; and, the issue of defendant's "claimed over payment of permanent disability...to the parties..." is deferred to the parties, jurisdiction reserved.

Applicant contends that defendant failed to meet its burden of proof to establish laches by failing to produce evidence of actual prejudice resulting from delay pursuant to *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 [200 Cal. LEXIS 6119], *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614 [1980 Cal. LEXIS 188], *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037 [2002 Cal.App. LEXIS 200], and *Lam v. Bureau of Security & Investigative Services* (1995) 34 Cal.App.4th 29 [1995 Cal.App. LEXIS 371]; that there is no substantial evidence to support the Findings; and, that the Findings deprived applicant of the right to due process pursuant to *Rucker v Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151 [65 Cal.Comp.Cases 805].

Defendant filed an Answer to Petition for Reconsideration (Answer). The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending denial of the Petition for Reconsideration because applicant states no good cause for delaying medical-legal discovery and applicant's delay would prejudice defendant who has already paid more than enough permanent disability advances.

We have reviewed the record in this matter, the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report. Based on our review of the record and for the reasons set forth below, it is our decision after reconsideration to rescind the Findings and return this matter to the trial level for further proceedings consistent with this decision.

I.

The underlying inter-vivos claim involved an admitted injury to decedent's spine on November 11, 2010. (Application for Adjudication, February 9, 2011 [claiming injury to lumbar and thoracic spine].) Decedent's claim was amended to add injury in the form of diabetes on December 18, 2012, and to add injury to psyche and in the form of weight gain on April 23, 2013. (Amended Applications for Adjudication of Claim, December 18, 2012 and April 23, 2013.) It is undisputed that decedent died on November 13, 2016.

It appears to be undisputed that no findings, orders, or awards issued in decedent's inter-vivos case as to compensability of body parts; permanent and stationary dates for decedent's

alleged injuries; or, as to temporary and permanent disability. (Pre-Trial Conference Statement (PTCS), October 31, 2022, p. 3; Defendant's Trial Brief, pp. 3-4.)

Defendant admits that the only doctor to determine a permanent and stationary date for decedent was QME Dr. Miles, but that "his reasoning and finding of a retro-active MMI date is unsupported and questionable." (Defendant's Trial Brief, p. 3.) Defendant also admits that orthopedic QME Dr. Chandran had not concluded evaluation of decedent prior to her November 13, 2016 death:

> As noted, applicant had multiple PQME evaluations with PQME Dr. Chandran with regard to the orthopedic aspects of her claim. Dr. Chandran never found her MMI. In his report of 12/25/14, pertaining to the 12/4/14 re-evaluation, at the top of page 2, it is noted that after the last surgery in January 2014, applicant did not have any relief of her symptoms. He did not find applicant MMI and requested diagnostic testing. Dr. Chandran re-evaluated applicant on 12/21/15 and in his report dated 12/27/15 from that re-evaluation, he once again did not find her MMI and requested additional diagnostic testing. Dr. Chandran authored a supplemental report on 3/31/16 and recommended that applicant undergo a neurosurgical evaluation to evaluate if any spinal surgery would be indicated.

(Defendant's Trial Brief, p. 4.)

A death claim was filed by applicant but found barred by the applicable statute of limitations pursuant to a Findings of Fact issued on October 18, 2018; discovery as to the death claim was closed at the April 17, 2018 MSC. (PTCS, April 17, 2018, p. 1, Disposition).

It appears undisputed that applicant proceeded with medical discovery relevant to section 4700 liability after final resolution of her death claim (i.e., October 18, 2018) by serving an interrogatory to the orthopedic QME, Dr. Chandran on September 28, 2020. It also appears undisputed that QME Dr. Chandran obstructed applicant's discovery sufficiently that applicant sought assistance from the WCJ to force Dr. Chandran to schedule a deposition and to comply with the mandated fee schedule. (Minutes, June 27, 2022.) Unfortunately, it appears that Dr. Chandran continued to be difficult and applicant was still waiting on a deposition date as of the MSC on October 31, 2022. (Minutes of Hearing and Summary of Evidence (MOH), April 20, 2023, p. 3.)[3] Applicant did, however, have the cross-examination deposition of internal QME Dr.

[3] Applicant listed, i.e., disclosed at least 20 exhibits in the October 31, 2022 Pre-trial Conference Statement supporting ongoing and failed discovery efforts with QME Dr. Chandran, but they remain "ID ONLY" in the Electronic Adjudication Management System (EAMS). (App. Exh. 1-10, 12, 14-22.) Findings of Fact no. 7 does not identify which exhibits were deemed inadmissible, so we cannot discern whether applicant's exhibits were meant to be left

Yousefi already set for March 22, 2023 at the time of the MSC, and after the MSC had Dr. Yousefi's deposition reset for August 16, 2023.

On May 25, 2022, applicant filed a Declaration of Readiness to Proceed (DOR) on issues of "accrued benefits." (DOR, May 25, 2022, p. 1.) Applicant stated that several e-mails were sent to defendant's counsel to meet and confer regarding "accrued PD," but with no response. (*Id.*, p. 2.) Defendant objected to the DOR stating that the death claim was barred and "there are no further benefits owed of any kind. Applicant attorney should have close[d] this file years ago. Filing for a hearing on a resolved case is [a] complete waste of the time and resources of the WCAB..." (Defendant's Objection to DOR, May 19, 2022, pp.1-2.)

On June 27, 2022, the WCJ issued a minute order that "Depo of QME to be scheduled. Doctor's office to note 8 CCR 9795 Reasonable level of Fees for Medical-legal testimony." (Minutes of Hearing, June 27, 2022, Other/Comments.)

Defendant filed a DOR on October 6, 2022 requesting a hearing on "accrued benefits" stating:

> Defendant denies that any accrued benefits are outstanding and owing. defendant objects retroactive development of the record six years after the death of applicant. defendant raises defenses including but not limited to laches and statute of limitations. WCAB assistance requested.

(DOR, October 6, 2022, p. 7.)

Applicant objected to this matter being set for mandatory settlement conference (MSC) where discovery might be closed because the medical evidence from the inter-vivos claim was incomplete, unclear, and no QME had yet to declare decedent P&S; that the record needed development; and, that the depositions of QME Drs. Chandran, Yousefi, Byrne and Miles were therefore necessary and still in the process of being scheduled. (Applicant's Objection to Defendant's DOR, October 14, 2022.)

The MSC went forward over applicant's objection on October 31, 2022. (See PTCS, October 31, 2022.) Decedent did not have the opportunity to cross-examine orthopedic QME Dr.

"ID ONLY" as subject to Findings of Fact no. 7, or whether their classification did not get changed in EAMS. Defendant objected to these exhibits because they received them on February 7, 2023, more than two months before trial, instead of on October 31, 2022. (MOH, p. 24.) Given that these exhibits were disclosed at the MSC pursuant to section 5502 and given the policy of holding hearings on their merits in workers' compensation, we cannot assume that this objection was sustained; however, the WCJ's Findings of Fact no. 7 did not identify those exhibits deemed inadmissible. However, there does not appear to be any dispute between the parties that QME Dr. Chandran obstructed applicant's attempt at discovery.

Chandran, or internal QME Dr. Yousefi, prior to the October 31, 2022 MSC. At the time of the MSC, applicant identified the issues as follows:

> Objection is hereby made to setting the case for trial and to closing discovery. The current record is not complete and contains defective and/or inadequate medical reporting and is thus not supported by substantial evidence as is necessary under Labor Code §5952 (d) and Labor Code §5953 and by substantial medical evidence in compliance with ***Escobedo v Marshalls*** 70 Cal. Comp. Cases 604 (2005) and as a result needs further development. Further, as to Defendant's objections, there has been no undue prejudice, particularly in light of the fact that the Defense Attorney has claimed since the 2018 Findings of Fact that its "file is closed" and has refused to participate in discovery, thereby thwarting Applicant's right to conduct discovery. If discovery closes over objection, then this is a request to reopen the record and otherwise to develop the medical and other evidence and record under ***McDuffie v Los Angeles County Metropolitan Transit Authority*** 67 Cal. Comp. Cases 138 (2002). By this party's signing the pre-trial conference statement, there is no waiver, expressed or implied, of the right to amend anything therein nor is it an affirmation that it is binding on this party nor does it limit or restrict this party's request, if any, to amend the stipulations and issues contained therein under Labor Code §5702, 8 C.C.R. §10517, Labor Code §3202, and in furtherance of substantial justice at any time.
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> Applicant has been attempting to obtain a supplemental report from QME Rama Chandran since serving an interrogatory on 09-28-20 to no avail, and has been attempting to set the cross-examination of Dr. Chandran since 03-08-21. On 06-24-21, the doctor responded with a fee request of $1,600.00, far in excess of the fee schedule for med-legal cross-examinations, but with no proposed dates. Applicant followed up on multiple occasions attempting to get the doctor's available dates, and on 04-04-22 finally received a list of dates. Applicant attempted to get the doctor to heed the fee schedule, but his office refused. Applicant thereafter filed a DOR and appeared for an MSC before WCJ Bernal on 06-27-22, where the WCJ issued an advisory order for Dr. Chandran to heed the fee schedule. Applicant served this on the doctor's office and once again attempted to set the cross-examination. The doctor's staff refused to set the cross-examination under the misapprehension that Dr. Chandran's cross-examination had already taken place. Upon realizing their mistake, they indicated that they would check with the doctor and get back to us. As of today's writing, Applicant has not heard back.
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> Additionally, the cross-examination of QME Dr. Keyvan Yousefi is currently set for 03-22-23.

(PTCS, p. 3 separate page, "Applicant's Issue and Objections," errors in the original.)

Defendant stated at the time of the MSC:

> Defendant contends that no accrued benefits are owed. Applicant and/or her heirs should be barred from trying to retroactively establish additional PD and/ or causation 6 years after death. Statute of limitations. Defendant fully complied with LC 4656. LC 5502 - closure of discovery. Defendant contends that there has been an overpayment of PD. Laches.

(PTCS, p. 3, original all-caps changed.)

This matter went to trial on April 20, 2023. (Minutes of Hearing and Summary of Evidence (MOH), April 20, 2023, pp. 2-3.) The parties stipulated at the time of trial that decedent Selene Martinez, while employed on November 11, 2010 as a territory service representative by Kellogg Company, sustained injury arising out of and in the course of employment to the lumbar spine. (*Id*., at p. 2.) No stipulations were made as to decedent's claimed injuries to psyche or diabetes. (MOH, at p. 2.)

Trial proceeded on various issues involving accrued and unpaid compensation pursuant to section 4700 including, in pertinent part, whether discovery should be closed pursuant to section 5502, subdivision (d)(3); whether applicant should be barred from cross-examination of QME Drs. Chandran and Yousefi; and, the decedent's permanent and stationary date. (*Id*., pp. 2-3.)

The WCJ found in pertinent part that decedent sustained compensable injury to the lumbar spine; that temporary total disability (TTD) was paid at the weekly rate of $486.57 for the period November 11, 2010 to November 12, 2012;[4] that permanent disability advances (PDA) were paid for the period November 13, 2012 to September 3, 2015;[5] that applicant's objections to the close of discovery under section 5502, subdivision (d)(3), were overruled; and, that applicant is barred from seeking cross-examination deposition testimony of QME Drs. Chandran and Yousefi by the equitable doctrine of laches. (Findings, Nos. 1-2, 8-9.) The WCJ then found that decedent's permanent and stationary (P&S) date was March 23, 2015 based on the reporting of the psychiatric QME Samuel Miles, M.D. (Exhibits 29 and 30). (*Id.*, at No. 10.) Finally, the WCJ deferred the issue of defendant's "claimed over payment of permanent disability...to the parties..." (*Id.*, at No. 11.)

[4] 104 weeks

[5] 146 weeks

The WCJ issued no findings of fact regarding decedent's claimed injuries to her thoracic spine, psyche or internal in the form of weight gain and/or diabetes. (Findings, at Nos. 1-11.) The WCJ issued no finding of fact as to defendant's liability for permanent disability. (*Ibid.*)

In the Opinion on Decision, and although no such finding was issued, the WCJ states that "internal PQME Dr. Keyvan Yousefi...found the claimed diabetes was non-industrial..." (Findings, Opinion on Decision, p. 4, citing Dr. Yousefi's January 14, 2015 report, Exh. 28.) In addition, the WCJ confirms that "[n]one of the reports issued by the orthopedic PQME Dr. Chandran found the [decedent's] condition had become permanent and stationary." (*Id.*, at p. 4, citing to Dr. Chandran's four reports at Exhs. 26-27, A-B.) The WCJ clarified the finding that laches barred applicant from further developing the medical record:

> The doctrine of laches acts similar to the statute of limitations, it would bar a claim from proceeding based on a delay in pursuing that claim. In this case it is the position of defendant that because of a long delay in pursuing discovery, which applicant contends is necessary, that defendant would be prejudiced in the event that further discovery was permitted to be conducted.
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> ...
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> In the case of Kaiser Foundation Hospitals/Permanente Medical Group v. Workers' Compensation Appeals Board (1976) 41 CCC 730, 1976 Cal. Wrk. Comp. LEXIS 2666, it was found substantial evidence supported the Board's finding a lien claim was barred by laches where lien claimant waited for over six years after it knew or should have known that an employee's need for medical treatment was industrially related before filing its claim.
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> In the case of Bell v. Workers' Compensation Appeals Board (1987) 52 CCC 72, 1987 Cal. Wrk. Comp. LEXIS 2273, the doctrine of laches was applied to bar a lien claimant's motion to set aside the Compromise and Release when lien claimant was found to have waited seven years to act on its claimed lien.
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> While the issues in the present case do not involve liens the doctrine of laches is equally applicable when applicant claims further discovery is necessary and defendant claims undue delay in pursing that discovery would be prejudicial.

(Findings, Opinion on Decision, p. 5.)

The WCJ cited to the following facts to support the finding that laches barred applicant from further development of the record and the cross-examination of QME Drs. Yousefi and Chandran:

> Applicant contends a supplemental report and cross-examination is needed from the orthopedic PQME Dr. Rama Chandran. It is alleged in the issues raised by applicant an interrogatory was served on Dr. Chandran September 28, 2020 and they have been trying to set the cross-examination of Dr. Chandran since March 8, 2021.
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> The trial record shows applicant was last examined by Dr. Chandran on February 24, 2016 and the report of the exam was issued March 31, 2016. Based on the contentions made by applicant an interrogatory was not sent to Dr. Chandran until September 28, 2020. There is no indication of any request for further discovery from Dr. Chandran between March 31, 2016 and September 28, 2020, a period of four years and six months.
> Applicant contends the cross-examination of the psyche PQME Dr. Samuel Miles was set for June 26, 2023. There was no indication given as to when that cross-examination was scheduled. The medical record shows the applicant was evaluated by Dr. Miles on March 23, 2015 and a report was issued April 22, 2015 (exhibit 29). The second evaluation by Dr. Miles was on November 23, 2015 and a report was issued December 22, 2015 (exhibit 30). Between the date of the issuance of the second report December 22, 2015 and the present the only noted activity is the claim the cross-examination has been set for June 26, 2023. That is a gap of approximately seven and a half years.

(Findings, Opinion on Decision, pp. 5-6.)

In the Report, the WCJ states that defendant argued in its trial brief that "no accrued benefits were owed and the proposed additional discovery was an attempt to retroactively establish additional permanent disability." (Report, p. 3.) The WCJ concludes that defendant has thus "sufficiently argued that substantial prejudice would occur as a result of the request to allow further discovery in the form of cross examinations and further reports from PQMEs Dr. Chandran and Dr. Yousefi." (*Ibid.*)

II.

Section 4700 governs the payment of accrued benefits upon the death of an injured worker. Under this Labor Code section, "[a]ny accrued and unpaid compensation *shall be* paid to the dependents, or, if there are no dependents, to the personal representative of the deceased employee or heirs or other persons entitled thereto, without administration." (Lab. Code, § 4700, emphasis added.)[6] Decedent's dependents or personal representative are entitled to any disability payments

[6] Hereinafter, "personal representative of the deceased employee or heirs or other persons entitled thereto, without administration" is referred to as "personal representative" for ease of reference.

she would have been entitled to up to the time of her death even where no award was made prior to the injured worker's death. (*State of California, Subsequent Injuries Fund v. Industrial Acci. Com. (Monteverde)* (1957) 151 Cal.App.2d 147, 149 [22 Cal.Comp.Cases 118], citing *Holmes v. McColgan* (1941) 17 Cal.2d 426, 430.) Defendant's payment of "accrued and unpaid compensation" to applicant under section 4700, if any is owed, is mandated.

A decision of the Workers' Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-81 [39 Cal.Comp.Cases 310].) The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) "'The referee or appeals board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence.'" (*Glass v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, 308 citing *Raymond Plastering Co. v. Workers' Comp. Appeals Bd. (King)* (1967) 252 Cal.App.2d 748 [32 Cal.Comp.Cases 287].)

This discretionary authority must be reconciled with the discovery cut-off contained in Labor Code section 5502(d)(3), which closes discovery at the time of the mandatory settlement conference. (See *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] ("*Kuykendall*"); *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].) "Section 5502, subdivision (d)(3) was enacted to minimize delays and efficiently expedite case resolution by making sure parties are prepared for hearing." (*Kuykendall, supra*, 79 Cal.App.4th at 404.) Section 5502, subdivision (d)(3) states in full as follows:

> (3) ... Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or 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).)

It appears undisputed that when decedent died on November 13, 2016, there were no final findings, orders, or awards determining defendant's liability for permanent disability in the inter-vivos claim. It also cannot be disputed that medical-legal discovery in her workers' compensation case was not completed at the time of her death. As pointed out by defendant, the last supplemental report issued by the orthopedic QME Dr. Chandran was on March 31, 2016 wherein the doctor did not find decedent MMI, and recommended an additional neurosurgical evaluation to evaluate whether spinal surgery would be indicated. (Trial Brief, p. 4, citing Def. Exh. B.)

In addition, we note that an April 15, 2015 Review of Records from decedent's treating internist, Maria Ruby Leynes, M.D., addressing the last opinion of the internal QME Dr. Yousefi that decedent's Type II diabetes was wholly non-industrial. (App. Exh. 5, Dr. Leynes Review of Records, April 15, 2015;[7] App. Exh. 3 & 28, Panel QME Report in Internal Medicine, Dr. Yousefi, January 14, 2015.) Dr. Leynes disagrees with Dr. Yousefi and states that decedent's industrial injury contributed to her Type II diabetes. (*Id.*) Moreover, the psychiatric panel QME Samuel I. Miles, M.D., Ph.D., reviewed Dr. Leynes' April 15, 2015 report and opinion and noted that "applicant gained 50 pounds from the time of the accident on November 11, 2010 to March 2015. The principal environmental trigger for type II diabetes is obesity." (App. Exh. 30, Qualified Medical Re-Examination in Psychiatry, December 22, 2015, p. 10.) Dr. Miles requested the he be advised "if Dr. Yousefi's opinion has changed in light of this data." (*Ibid.*)

Thus, there appears to be a credible need to cross-examine the orthopedic QME Dr. Chandran and the internal QME Dr. Yousefi to ensure that the record contains substantial medical evidence for the finder of fact determine defendant's section 4700 liability, if any. There may also be the need for supplemental reporting from psychiatric QME Dr. Miles given his request to be advised regarding Dr. Yousefi's opinions.

Here, applicant objected to defendant's October 6, 2022 DOR based on this need for further development of the medical record, and again reiterated the objection at the October 31, 2022 MSC (as well as in Applicant's Trial Brief and at the April 20, 2023 trial). The WCJ failed to recognize the need for further development of the record prior to the MSC, i.e., prior to the section 5502 discovery cut-off, when it would have been appropriate to delay the MSC in order to minimize any further delay and perhaps, expedite the parties' resolution of the section 4407 issue. Instead, the

[7] Exhibits admitted during the July 31, 2018 trial are part of the record of proceedings in this case, ADJ7651912. (Cal. Code Regs., tit. 8, § 10803.)

WCJ chose to move forward with the MSC, close discovery, and move forward with trial on an inadequate record. As a result, the WCJ was understandably unable to issue findings as to defendant's liability for permanent disability in the inter-vivos claim, if any, or to issue an award of "any accrued and unpaid compensation" to applicant pursuant to section 4407, if any.

We disagree with the decision of the WCJ to move forward with the MSC despite the need for further development of the record to ensure substantial medical evidence on all relevant issues, and therefore we must also disagree with the WCJ's finding that it was proper to close discovery at the time of the MSC despite that need.

Given the need to develop the record, which assumes the inability of the factfinder to adequately assess defendant's liability for any "accrued and unpaid compensation" to decedent, it is our decision after reconsideration to rescind the Findings and return this matter to the trial level for further proceedings consistent with this decision.

III.

We disagree with the WCJ that applicant should be barred by the doctrine of laches from proceeding with the cross-examination depositions of orthopedic QME Dr. Chandran and internal QME Yousefi because she waited too long to initiate section 4700 liability proceedings.

Laches is an affirmative defense to applicant's section 4700 claim, and therefore defendant had the affirmative burden of proof. (Lab. Code, § 5705.) "Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances... (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624 (*Miller*).)[8] The Supreme Court describes the requisite showing for a claim to be barred by laches as follows:

> As we pointed out in *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351 [82 Cal. Rptr. 337, 461 P.2d 617], the affirmative defense of laches requires unreasonable delay in bringing suit "plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Id*., at p. 359, fns. omitted.) *Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens*

[8] "The appeals board has broad equitable powers with respect to matters within its jurisdiction. (*Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [28 Cal.Rptr.2d 30].) Thus, equitable doctrines. . .are applicable in workers' compensation litigation. (*State Farm General Ins. Co. v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 258, 268 [159 Cal.Rptr.3d 779]; 2 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed. 2016) § 24.03[1], p. 24-14 (rel. 81-3/2015).)" (*Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685].)

of proof and the production of evidence on the issue. (*Id*., at p. 361.)" (*Miller, supra,* 27 Cal.3d at p. 624, emphasis added.)

"[P]rejudice should not be presumed solely because of the fact of delay: '[U]nreasonable delay by the plaintiff is not sufficient to establish laches. There must *also* be prejudice to the defendant resulting from the delay or acquiescence by the plaintiff." (*Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1049-1051, italics in the original.)

Here, it is undisputed that applicant proceeded with medical discovery relevant to section 4700 liability after final resolution of her death claim, and that orthopedic QME Dr. Chandran obstructed applicant's discovery despite court intervention until after the October 31, 2022 MSC. The record shows that applicant did have the cross-examination deposition of internal QME Dr. Yousefi set for March 22, 2023 at the time of the MSC, and then had his deposition reset after discovery was closed at the MSC to August 16, 2023.

We disagree with the WCJ that it was unreasonable for applicant to wait until after the 2018 adjudication of the death claim to pursue section 4700 liability, given the complexity of the trial issues in the death case. Also, while not the model of best practice, we also disagree with defendant and the WCJ that the delay of two years between the final order in the death claim and the September 28, 2020 initiation of discovery to recover section 4700 benefits was unreasonable.[9]

However, even if we assume arguendo for purpose of argument that applicant's delay was unreasonable, the WCJ does not affirmatively demonstrate prejudice to defendant caused *by the delay itself*. In the Opinion on Decision, the WCJ conflates the element of prejudice with the element of unreasonable delay by stating that like a statute of limitations, laches "would bar a claim from proceeding based on a delay in pursuing that claim." (Findings, Opinion on Decision, p. 5.) This analogy ignores the need to establish the second element of laches, i.e., prejudice *caused* by the unreasonable delay.

We are also not persuaded by the panel decisions cited by the WCJ in *Kaiser Found. Hospitals/Permanente Med. Group v. Workers Compensation Appeals Bd. of California* (1976) 41 Cal.Comp.Cases 730, 731[1976 Cal.Wrk.Comp. LEXIS 2666], and *Bell v. Workers Compensation*

[9] We find defendant's contentions in this regard somewhat disingenuous given that it apparently ignored applicant's emails to engage in meet and confer, and then responded to applicant's attempt to seek judicial assistance with Dr. Chandran by objecting that it was a "complete waste of the time and the resources of the WCAB..." because applicant's *death claim* was barred. (Defendant's Objection to Declaration of Readiness to Proceed, May 19, 2022, p. 2.)

Appeals Bd. of California & Los Angeles (1987) 52 Cal.Comp.Cases 72 [1987 Cal.Wrk.Comp. LEXIS 2273].[10] Unlike lien claimant in *Bell*, for instance, applicant here is *entitled* to section 4700 payment, if any is due. (Lab. Code, § 4700 ["Any accrued and unpaid compensation *shall be paid*..."], emphasis added.) Moreover, the publisher's summary in both cases is insufficient to determine whether we would have reached the same decision, especially since neither summary discusses the necessary element of prejudice.

In the Report, the WCJ adds to the Opinion on Decision by adopting defendant's contention that prejudice was caused from the delay because "no accrued benefits were owed and the proposed additional discovery was an attempt to retroactively establish additional permanent disability." (Report, p. 3.) Thus, the cost of the discovery is unnecessary and prejudicial. We disagree. As set forth above, there were no final findings, orders, or awards determining defendant's liability for permanent disability in decedent's inter-vivos claim; decedent had yet to be declared MMI by the orthopedic QME; and medical-legal discovery in general was left incomplete. Consequently, the conclusion that there remains no accrued and unpaid compensation owed to applicant under section 4700 cannot be supported by a record where it has *yet to be determined* how much compensation was owed to decedent at the time of her death, if any.

The decision of the WCJ to impose laches to bar applicant from proceeding with necessary development of the record to establish her section 4700 claim, was therefore not based on substantial evidence of unreasonable delay or prejudice to defendant caused by unreasonable delay. "Any decision to impose laches not based on substantial evidence would constitute "a manifest injustice." (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1286 [1989 Cal.App. LEXIS 517].) In other words, any such decision would be vulnerable to appellate review. (*Id.*; see Lab. Code, § 5950 et seq.)

Finally, we do not believe that the discovery delays in this matter are significant enough to deny applicant due process, i.e., to deny her the right to cross-examine QME Drs. Chandran and Yousefi. All parties to a workers' compensation proceeding retain the fundamental right to due

[10] Panel decisions are not binding precedent (as are en banc decisions) on all Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Bd. en banc).)

process and a fair hearing under both the California and United States Constitutions. (*Rucker, supra,* 82 Cal.App.4th at pp. 157-158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, 82 Cal.App. 4th at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Accordingly, given that section 4700 mandates payment to the dependents or personal representative of "any accrued and unpaid compensation" owed to a deceased injured worker, and given that there is clear need in this case for the medical record to be developed in order to determine whether any such payment is due, it is our decision after reconsideration to rescind the Findings and return this matter to the trial level for further development of the record consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on June 19, 2023 by a workers' compensation administrative law judge is **RESCINDED** and this matter is **RETURNED** to the trial level for further development of the record consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 27, 2023

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

LOURDES ALCANTARA
PEREZ LAW, PC
HINSHAW & CULBERTSON, LLP

AJF/abs

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