WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EDDIE LARA, III, *Applicant*

vs.

ASHLEY FURNITURE, ACE AMERICAN INS.;
RANSTAD STAFFING, ESIS, adjusted by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ12430291
Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration of the Findings and Order (F&O) issued on August 26, 2022, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

The WCJ found in pertinent part that applicant claimed injury to various body parts while employed by defendant during the period of October 15, 2017 to August 16, 2018, as an unloader; applicant was "doctor shopping" and while he "was initially entitled to obtain" a different qualified medical evaluator (QME), "applicant's attorney waited too long and did not timely address this fundamental QME procedural issue"; and that the QME's opinion was not substantial evidence. The WCJ ordered that applicant's request for another QME was denied and that the issue of injury arising out of and in the course of employment (AOE/COE) was deferred.

Applicant contends, in pertinent part, that the WCJ erred because the WCJ failed to follow the Appeals Board's en banc opinion in *Navarro v. City of Montebello* (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc).

[1] Commissioners Sweeney and Dodd were on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board and Commissioner Dodd is currently unavailable to participate in this decision. New panel members have been appointed in their place.

We have received an answer from each of the defendants. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the Answers and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration, we will affirm the August 26, 2022 F&O, except that we will find that applicant is not required to return to the QME from his other case and is entitled to a proceed with a QME evaluation with another evaluator.

FACTS

Applicant claimed to have sustained a cumulative industrial injury through June 28, 2018, to his back, shoulders, and upper extremities in ADJ11401487. (Application for Adjudication, ADJ11401487, July 20, 2018.) According to the August 27, 2021 report of QME Jayprakash Shah, M.D., he previously evaluated applicant on January 11, 2019.[2] (Exhibit 1, Report of Jayprakash Shah, M.D., August 27, 2021, p. 1.) The parties resolved this first injury via Compromise and Release, which was approved on June 19, 2019. (Order Approving Compromise and Release, June 19, 2019.)

Applicant subsequently claimed to have sustained a cumulative industrial injury through August 16, 2018, to his thigh, knee, ankle, and foot in ADJ12430291, with a DWC-1 claim form filed on August 6, 2019.[3] (Application for Adjudication, ADJ12430291, January 27, 2020.)

These cases were consolidated for hearing on April 8, 2020. (Order Consolidating Cases, April 8, 2020.) Initially, defendants sought a trial to bar applicant's subsequent claim of cumulative injury, which was denied. (Findings and Order, June 14, 2021.)

For reasons unknown, defendant thereafter set an appointment with the QME in applicant's first injury. There is no agreement in the record to use Dr. Shah as an agreed medical evaluator (AME). No party asserts that Dr. Shah is an AME. Applicant attended the appointment set by

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[2] Inexplicably, the January 11, 2019 report was not submitted in ADJ11401487 at the time of settlement approval, nor was it submitted as an exhibit in ADJ12430291.

[3] The 2019 DWC-1 claim form was not part of the evidence admitted into the record at trial. We take judicial notice of this claim form in the Electronic Adjudication Management System (EAMS). (See *Faulkner v. Workers' Comp. Appeals Bd*. (2004) 69 Cal.Comp.Cases 1161 (writ den.) [the Court of Appeal found that the WCAB may take judicial notice of the DWC-1 claim form even if it has not been admitted into evidence].)

defendant. Dr. Shah issued a report finding no industrial injury. (Applicant's Exhibit 1, Report of Jayprakash Shah, M.D., August 27, 2021.) Applicant then deposed Dr. Shah. (Applicant's Exhibit 2, Deposition of Jayprakash Shah, M.D., February 28, 2022, p. 2, lines 23-26.)

Three days prior to Dr. Shah's deposition, on February 25, 2022, applicant obtained a QME panel in the present injury from which both parties exercised their strike. (Applicant's Exhibits 4, 5, and 6.) Defendant represents in their answer that applicant's attorney did not disclose the new panel prior to the deposition. (Defendant Randstad's Answer to Petition for Reconsideration, September 27, 2022.)

DISCUSSION

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.) 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.

Here, the WCJ's decision includes a finding regarding a threshold issue as employment by defendants and their respective insurance coverage. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (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).) Here, based upon the WCJ's analysis of the merits of the petitioner's arguments, we are persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

In *Navarro v. City of Montebello* (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc), the Appeals Board held en banc that the "Labor Code does not require an employee to return to the same panel QME for an evaluation of a subsequent claim of injury." (*Navarro*, *supra*, 79 Cal. Comp. Cases at p. 420.)

> Considering section 4062.3(j) and section 4064(a) together, both sections state that a medical evaluation shall address "all medical issues arising from all injuries reported on one or more claim forms." Both sections refer to an injury reported on a claim form as the operative act, and not to a date of injury, a report of injury other than on a claim form, or the filing of an application with the WCAB. Under section 5401, an employer must provide a claim form and an injured worker must file a claim form with an employer. Hence, the reported date under sections 4062.3(j) and 4064(a) must be the filing date as defined by section 5401 because only section 5401 refers to filing a claim form. Because the date the claim form is filed with employer is the operative act, the date of filing of the claim form determines which evaluator must consider which injury claim(s).

(*Navarro*, *supra*, 79 Cal. Comp. Cases at pp. 423-424.)

The *Navarro* decision also held that the requirement in AD Rule 35.5(e) "that an employee return to the same evaluator when a new injury or illness is claimed involving the same parties and the same type of body parts is inconsistent with the Labor Code, and therefore, this requirement is invalid." (*Id*. at p. 426.)

> While parties are not precluded from agreeing to return to the same evaluator for subsequent claims of injury, based on the foregoing, we conclude that an employee may be evaluated by a new evaluator for each injury or injuries reported on a claim form after an evaluation has taken place. Thus, regardless of whether a subsequent claim of injury is filed with the same employer or a different employer and regardless of whether injury is claimed to the same body parts or to different body parts, when a subsequent claim of injury is filed, the Labor Code allows the employee and/or the employer to request a new evaluator. In keeping with the limitations set forth in sections 4062.3(j) and 4064(a), at the time of an evaluation the evaluator shall consider all issues arising out of any claims that were reported before the evaluation, and if several subsequent claims of injury are filed before the evaluation by the new evaluator takes place, that one new evaluator shall consider all of those claims of injury.

(*Id*. at p. 425, emphasis added.)

Here, the WCJ found that applicant was "doctor shopping" and thus, was not entitled to a new evaluation in this case. We addressed this issue directly in the *Navarro* decision:

> We are aware that in a particular case it may be beneficial to one side to seek a new evaluator and that unfortunately, a subsequent claim of injury could be filed by an employee or an employer with the goal of "doctor-shopping," potentially leading to increased medical-legal costs and delays. However, since these provisions of the Labor Code apply equally to both employees and employers, we do not see that either side gains an overall advantage.

(*Id*. at p. 428.)

Under the principles outlined in *Navarro*, both parties are clearly entitled to a new QME evaluation in the claim of subsequent cumulative injury.[4] The issue of whether a party is "doctor-shopping" in seeking a panel QME on a subsequent claim of injury is not part of this analysis. While there may be cases where the filing of a subsequent claim could constitute frivolous and/or bad faith conduct, however, even in such cases, the question is not whether a QME panel should issue, but instead whether a party or their attorney is liable for the costs of the evaluation or other sanctions under Labor Code section 5813.

Defendants' argument is essentially that applicant is equitably estopped from proceeding with a QME because he attended the appointment set by defendant with Dr. Shah and then took Dr. Shah's deposition.

[4] Had Dr. Shah found industrial injury, defendant would also be entitled to a QME evaluation.

> It is universally recognized that prerequisites to applicability of the doctrine of equitable estoppel are that the party asserting the estoppel **must have been ignorant of the true facts** and must have relied upon the words or conduct of the adverse party to his or her detriment.

(*Hurwitz v. Workers' Comp. Appeals Bd*., (1979) 97 Cal. App. 3d 854, 874 (emphasis added).)

Applicant is not estopped. Defendants knew that Dr. Shah was not the selected QME in this matter. Defendants knew that Dr. Shah was not an AME. Defendants proceeded at their own peril in setting the appointment with Dr. Shah. Applicant's agreement to attend the evaluation does not bear on the issue of whether applicant is entitled to another QME or bar applicant from obtaining a QME. When a new claim form is filed after a QME evaluation has occurred, we recommend that the parties discuss whether they wish to seek an express agreement to use an AME or intend to obtain a new QME. In short, the parties should not proceed on assumption.

Here, defendant alleges that applicant obtained another QME panel three days before taking the deposition of Dr. Shah and did not disclose this fact to defendants. However, the issue of whether applicant attorney's actions constituted bad faith and/or frivolous conduct, which, if found, may support an award of costs associated with the deposition is not presently before us.

Accordingly, as our Decision After Reconsideration, we affirm the August 26, 2022 F&O, except that we amend it to find that applicant is not required to return to Dr. Shah in this matter and is entitled to a proceed with an evaluation by another QME.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on August 26, 2022 by the WCJ are **AFFIRMED**, except they are **AMENDED** as follows: :

FINDINGS OF FACT

4. Applicant is not required to return to Dr. Shah in this matter and is entitled to another QME.

ORDERS

IT IS ORDERED THAT applicant's request to proceed with a panel qualified medical evaluator is **GRANTED**.

IT IS FURTHER ORDERED THAT the issue of AOE/COE is deferred, jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ _KATHERINE A. ZALEWSKI, CHAIR_____

I CONCUR,

/s/ _JOSEPH V. CAPURRO, COMMISSIONER_____

/s/ _LISA A. SUSSMAN, DEPUTY COMMISSIONER_

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 6, 2024

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

EDDIE LARA III
SOLOV AND TEITELL, A.P.C.
MICHAEL SULLIVAN & ASSOCIATES LLP

EDL/oo

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