WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TAMMY STEPHENS LEON, *Applicant*

vs.

VISTA UNIFIED SCHOOL DISTRICT, permissibly self-insured, adjusted by KEENAN AND ASSOCIATES, *Defendants*

Adjudication Number: ADJ11525409

San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration of the Findings and Order (F&O) issued on August 5, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant sustained industrial injury on August 18, 2017, and that the injury was presumed industrial pursuant to Labor Code[1] section 5402(b). The WCJ further sustained applicant's objection to the QME's reporting and excluded it from coming into evidence.

Defendant contends that the WCJ erred because the initial QME evaluation was properly obtained based upon a claim delay letter and that the QME's reporting rebuts the presumption of compensability.

We have received an answer from applicant. 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, the Answer, 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 5, 2021 F&O, except that we will amend the F&O to strike the finding that sustained applicant's objection to the QME's reporting.

[1] All future references are to the Labor Code unless noted.

FACTS

Per the WCJ's Report:

> Applicant Tammy Stephens Leon asserts on August 18, 2017 she sustained injury to her left shoulder, left elbow, neck, left arm, left hand and back while working for Vista Unified School District.
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> On September 18, 2017, Applicant reported her injury to her employer via a DWC-1 form. Human resources technician for the employer, Lilian E. Parker, signed the DWC-1 claim form on the same date. (See DWC-1 form dated September 18, 2017 Applicant Exhibit 1). After reporting her injury, Applicant presented to occupational medicine provider U.S. Health Works. (U.S. Heath Works report dated September 18, 2017, Applicant Exhibit 2).
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> Applicant continued to treat with U.S. Health Works on the following occasions: September 19, 2017, September 22, 2017, September 22, 2017, September 28, 2017, October 2, 2017, October 9, 2017, October 16, 2017, October 25, 2017 November 1, 2017, November 9, 2017, December 7, 2017, December 22, 2017, January 4, 2019, January 18, 2018, January 25, 2018, February 16, 2018, and March 1, 2018. (See U.S. Health Work reports Applicant Exhibits 4-19).
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> On January 8, 2018 (112 days after the DWC-1 form was dated and signed by both Applicant and Employer), Defendant sent notice of denial of claim. Said denial letter indicated the claim was denied on the basis that a qualified medical evaluation was pending with PQME Dr. Edward H. Bestard. (See denial letter dated January 8, 2018 Defendant Exhibit E).
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> On March 20, 2018, Applicant presented for a qualified medical evaluation with Dr. Edward H. Bestard, M.D.
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> On April 16, 2018, Defendant sent Applicant a second denial letter. This second denial letter confirmed and maintained the prior denial based upon the medical reporting from PQME Dr. Edward Bestard, M.D. (See denial letter dated April 16, 2018 Defendant F).
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> On July 31, 2018 (after the PQME evaluation), Applicant sought representation by counsel. (See Representation letter in EAMS dated 7/31/2018). Applicant counsel filed a DOR and the matter was set for a Priority Conference.

> On April 26, 2021, the parties presented for a Priority Conference before Honorable WCJ Jeffrey Bruflat. At the time of the Priority Conference, the parties prepared and filed a Pre-Trial Conference Statement. The trial was set for June 14, 2021 before the undersigned. At the time of the Priority Conference the parties listed their respective evidence and exhibits. The WCJ notes the PTCS fails to list the delay letter Defendant now attempts to introduce via its post-trial brief.
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> On June 14, 2021, the parties presented for Trial. At issue for trial were (1) injury arising out of and in the course of employment and (2) the presumption of compensability under Labor Code Section 5402(b).
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> At trial, Applicant raised an objection to the admissibility of the four reports of PQME Dr. Bestard, M.D. (Defendant Exhibits A, B, C, and D). The WCJ deferred ruling on this issue and ordered the parties to file post-trial briefs.
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> No testimony was taken and the matter was submitted on the record.
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> (WCJ's Report, September 3, 2021, pp. 3-4.)

DISCUSSION

The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (Id. at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, [The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id*. at 577.)

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. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584]; *Rucker*, *supra*, at 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.4 703, 710 [57 Cal.Comp.Cases 230].)

Section 5502 provides that where the parties cannot settle a matter at the mandatory settlement conference "the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. 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." (§ 5502(d)(3).)

However, the WCJ has discretion to augment the issues presented on the pre-trial conference statement at the time of trial in order to effectuate substantial justice, where such augmentation does not impede on the opposing party's right to due process. (*Mary Davis v. Interim Healthcare*, et al. (2000) 65 Cal.Comp.Cases 1039 (Appeals Board en banc); see also § 5708 [The WCJ "may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division."].)

Section 5402 provides: "(b) 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." (§ 5402(b) (emphasis added).) A 'claim form' is defined as "[t]he official Division of Workers' Compensation DWC Form 1 Employee's Claim for Workers' Compensation Benefits" as established under Administrative Director Rule 10139. (Cal. Code Regs., tit. 8, §§ 10136, 10139.) The filing of a 'claim form' triggers the 90-day provision of section 5402. (*Honeywell v. Workers' Comp. Appeals Bd*. (2005) 35 Cal.4th 24.)

Here, for the reasons stated by the WCJ in her Report, we agree that applicant's claim was presumptively accepted pursuant to section 5402. Accordingly, we affirm the F&O on that issue.

The WCJ struck the reporting of the QME on the grounds that defendant obtained the QME panel prior to *denying* the claim. The WCJ correctly notes that defendant's *delay* letter, which

appears to have formed the basis for the QME panel, is not in evidence. The WCJ is correct that defendant's act of attaching the delay letter to its post-trial brief does not result in the letter being in evidence. However, it would appear that defendant properly obtained the QME using the delay letter. Defendant did not list the delay letter as evidence on the pre-trial conference statement because applicant did not raise the issue. Applicant first raised this issue on the day of trial. Even then, applicant did not state their objection on the record, but instead stated their objection via post-trial briefing. Given that applicant first stated the grounds of their objection after the trial concluded, defendant should have been provided a reasonable opportunity to respond, which includes the opportunity to augment their exhibits to include the delay letter. In this case, substantial justice warranted accepting the delay letter into evidence. Accordingly, we will strike the finding and order that sustained applicant's objection to the QME's reporting. However, as discussed below, this error was harmless and did not affect the application of the presumption.

The admissibility of the QME's reporting is irrelevant as defendant failed to present any evidence that it could not have obtained the QME's opinion within 90 days of receipt of the claim form. No testimony was offered. No exhibits address defendant's efforts to timely investigate the claim within the 90-day period. Given that defendant failed to show that the QME reports could not have been otherwise obtained within the 90-day period, they cannot be used to rebut the presumption of compensability.

Accordingly, as our Decision After Reconsideration we will affirm the August 5, 2021 F&O, except that we will amend the F&O to strike the finding that sustained applicant's objection to QME's reporting.

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 5, 2021, is **AFFIRMED, EXCEPT THAT** Finding of Fact # 4 and Order # 3 are **STRICKEN**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 19, 2024

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

TAMMY STEPHENS LEON
LAW OFFICES OF MANUEL RODRIGUEZ
BENJUMEA & ASSOCIATES

EDL/mc

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