WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOHN SWARTZ, *Applicant*

vs.

SARATOGA RETIREMENT COMMUNITY;
permissibly self-insured, administered by ATHENS ADMINISTRATORS, *Defendants*

Adjudication Numbers: ADJ12292905, ADJ12292906
San Jose District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

We have considered the allegations of defendant's Petition for Reconsideration or in the alternative Removal and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny the Petition as one seeking reconsideration.

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 (AOE/COE), 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.)[1] 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

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

interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

The Findings and Order (F&O) included a finding that applicant sustained injury AOE/COE to specific body parts with respect to both his claims. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Generally, a petition for reconsideration must be filed within 20 days of a "final" decision, plus an additional five days if service of the decision is made by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).) Where an order can be shown to have been defectively served, the time limit begins to run as of the date of receipt of the order. (*Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193].)

Defendant filed its Petition challenging the November 2, 2020 F&O on December 7, 2020, which was more than 25 days from the date the F&O was reportedly served. Defendant avers in its verified Petition that the F&O was not served on it by mail until November 20, 2020. Accordingly, we will treat defendant's Petition as timely filed.

Although the decision contains a finding that is final, defendant is only challenging the WCJ's finding that defendant's request for a replacement qualified medical evaluator (QME) panel is denied. This is an interlocutory decision regarding discovery. 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Defendant concedes that there is no evidence that the QME Dr. Robert Weinmann received the information that applicant sent to him in violation of section 4062.3(b). (Defendant's Petition

for Reconsideration or in the alternative Removal, December 7, 2020, p. 4:8-10.) Defendant cites to *Pettit v. Ventura Regional Sanitation District* (June 1, 2018, ADJ9869800) [2018 Cal. Wrk. Comp. P.D. LEXIS 271] in support of its entitlement to a replacement QME panel despite the lack of evidence that the QME received this information.

Defendant misrepresents what occurred in *Pettit*. Contrary to defendant's contention that the QME in *Pettit* did not receive the information sent to him by defendant in violation of section 4062.3(b), the record in that matter showed that the QME unquestionably received the job description sent to him by defendant. Specifically, the QME's office faxed to applicant's attorney a copy of the job description. (*Pettit*, *supra*, at pp. *6-7, 10.) Moreover, as the WCJ discussed in his Report regarding why a replacement QME panel was warranted in *Pettit*, the accuracy of the job description was pivotal to the issue of causation because the QME had reserved the right to change his causation opinion once he had reviewed the job description. Due to the pivotal nature of this information and the evidence that the QME had indisputably received it, the panel in *Pettit* affirmed the WCJ's conclusion that under the circumstances a replacement QME panel was warranted.

It is worth noting that there were indications in *Pettit* that defendant may have misrepresented to applicant whether the QME had received the job description per its letter to applicant reporting that the QME purportedly confirmed that he did not receive defendant's letter or the enclosed job description. The panel stated in a footnote in relevant part:

> We note that we are troubled by defendant's February 6, 2017 letter to applicant wherein defendant avers that the QME did not receive its December 19, 2016 letter or the job description. (Applicant's Exhibit No. 4, Letter from defense attorney to applicant's attorney, February 6, 2017.) Defendant advised the QME's office by phone on January 11, 2017 that it did not need the supplemental report requested in its December 19, 2016 letter. The QME's office faxed to applicant a copy of defendant's December 19, 2016 letter and the enclosed job description on February 9, 2017. Accordingly, the evidence reflects that the QME *did* receive the letter and job description sent by defendant. (Applicant's Exhibit No. 5, Fax cover sheet and accompanying documentation from Dr. Litoff to applicant's attorney, February 9, 2017.) Under the current record, defendant's February 6, 2017 letter appears to be a misrepresentation to applicant regarding its communications with the QME's office.
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> (*Pettit*, *supra*, at p. *24, fn. 3, emphasis in original.)

We are similarly troubled in this matter by defendant's misrepresentations in its Petition regarding the facts of the *Pettit* case. Defendant is reminded that a party or attorney may be sanctioned for executing a declaration or verification to any petition, pleading or other document filed with the Appeals Board that contains substantial misrepresentations of facts. (Cal. Code Regs., tit. 8, former § 10561(b)(5)(A), now § 10421(b)(5)(A) (eff. Jan. 1, 2020); see also Lab. Code, § 5813.) If the defendant here seeks to learn from what occurred in *Pettit*, the defendant's apparent misrepresentation of facts in that matter is not conduct to emulate.

As stated by the WCJ in her Report, *Pettit* was a panel decision and is therefore not controlling. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).) The en banc decision, *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (Appeals Board en banc), is binding on all WCJs and Appeals Board panels. (Cal. Code Regs., tit. 8, former § 10341, now § 10325(a) (eff. Jan. 1, 2020); *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109].) The *Pettit* decision issued prior to *Suon* and the panel in *Pettit* was therefore not bound by the analysis in *Suon*. However, we disagree with the WCJ that *Pettit* is at odds with *Suon*. The WCJ incorrectly stated that *Pettit* "held that in a case like this, the only remedy was to replace the QME and the *Petit* [*sic*] case made it clear that it was irrelevant whether the QME ever received or reviewed the information provided." (WCJ's Report, December 17, 2020, p. 5.) This was not the holding in *Pettit*. As discussed above, the QME in *Pettit* received the information defendant sent to him, which was considered pivotal to his causation opinion. Furthermore, we are persuaded that if the factors outlined in *Suon* for determining the appropriate remedy for violating section 4062.3(b) had been applied to the record in *Pettit*, the outcome would have remained the same.

In this matter, defendant has not shown that the remedy of a replacement QME panel is warranted. Consequently, defendant has not shown that the F&O will result in significant prejudice or irreparable harm, or that reconsideration will not be an adequate remedy.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on November 2, 2020 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2021

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

FINNEGAN MARKS THEOFEL & DESMOND
JOHN SWARTZ
LAW OFFICES OF MAYEN & HERRERA

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