

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

REFUGIO JOSE ALFARO (Deceased), *Applicant*

vs.

**INTERSTATE HOME SERVICES;
INSURANCE COMPANY OF THE WEST, adjusted by ICW GROUP, *Defendants***

**Adjudication Number: ADJ7785974
Fresno District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION**

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Defendant requested approval to file a supplemental pleading and applicant filed an objection to defendant's supplemental pleading. We accept both supplemental pleadings per WCAB Rule 10964. (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).) Based on our review of the record and for the reasons discussed below, we will grant the Petition as one seeking reconsideration solely to amend the Findings of Fact, Order and Opinion on Decision (F&O) to provide the parties with an opportunity to agree to an agreed medical evaluator (AME) in lieu of proceeding with an evaluation with the appointed physician. We will otherwise affirm the F&O.

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. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, defendant is only challenging the WCJ's appointment of an independent medical evaluator to evaluate Daniel Alfaro, the deceased employee's son, per section 5701. 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).)

The Appeals Board has the discretionary authority under section 5701 to develop the record when the medical record is not substantial evidence. (Lab. Code, § 5701; see also Lab. Code, § 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].) Per *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 142 (Appeals Board en banc), the preferred procedure for developing a deficient record is to first allow supplementation of the medical record by the physicians who have already reported in the case. "If the use of physicians new to the case

becomes necessary, the selection of an agreed medical evaluator (AME) by the parties should be considered at this stage in the proceedings.” (*Id.*) The *McDuffie* decision concludes that “if none of the procedures outlined above is possible, the WCJ may resort to the appointment of a regular physician, as authorized by Labor Code section 5701.” (*Id.* at pp. 142-143.)

The WCJ in this matter therefore has the authority to appoint a regular physician to evaluate Daniel Alfaro. The record does not reflect that there are preexisting physicians that have already evaluated Daniel Alfaro. The record consequently cannot be developed with existing physicians. However, if new physicians are needed, the parties are then to consider using an AME before a regular physician is appointed per *McDuffie*.

Consequently, we will grant reconsideration and amend the F&O to add a finding that the parties may agree to an AME in lieu of proceeding with the evaluation with the appointed physician. We are otherwise not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Reconsideration of the Findings of Fact, Order and Opinion on Decision issued by the WCJ on November 18, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Order and Opinion on Decision issued by the WCJ on November 18, 2020 is **AFFIRMED** except that it is **AMENDED** to add the following:

FINDINGS OF FACT

* * *

16. The parties may agree to an AME within 10 days of this decision in lieu of proceeding with the evaluation with the IME Dr. Munday.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 12, 2021

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

**BRADFORD & BARTHEL
DANIEL ALFARO
GROSSMAN LAW OFFICES**

AI/pc

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