WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAMES BARRERA, *Applicant*

vs.

STATE OF CALIFORNIA,
RICHARD A. MCGEE TRAINING CENTER, Legally Uninsured;
STATE COMPENSATION INSURANCE FUND/
STATE CONTRACT SERVICES, Adjusting Agency, *Defendants*

Adjudication Number: ADJ13437168
Santa Barbara District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and 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 stated in the WCJ's report, which we adopt and incorporate, we will deny both reconsideration and removal.

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 findings regarding threshold issues and is a final order subject to reconsideration rather than removal. Petitioner is challenging the WCJ's finding that applicant's actions were not in bad faith or frivolous or solely intended to cause delay pursuant to Labor Code section 5813 (Finding 5). The finding that no sanctions and no costs pursuant to Labor Code section 5813 were warranted is a final order, and we agree with the WCJ that sanctions and costs were not warranted.

Petitioner is also challenging the finding that an additional panel in the specialty of cardiology is warranted (Finding 4). The finding as to the cardiology panel is an interlocutory finding/order in the decision., and we will apply the removal standard to our review of that issue. (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, for the reasons stated in the WCJ's report, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

We acknowledge that disagreements can sometimes arise when the attorneys engage in zealous advocacy. Both parties are reminded that when parties resolve disputes amicably, the legal system functions more efficiently. We encourage the parties here to work together where possible so as not to waste the scarce resources of the Appeals Board.

Accordingly, we deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact issued by the WCJ on April 6, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 30, 2023

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

JAMES BARRERA
WHITING, COTTER & HURLIMANN, LLP
STATE COMPENSATION INSURANCE FUND, LEGAL

AS/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

A timely, verified Petition for Reconsideration, filed 5-1-2023, Petitioner, State of California Department of Corrections; Richard A. Mcgee [McGee] Correctional Facility (hereafter Petitioner), by and through their representative of record, State Compensation Insurance Fund, seeks reconsideration of the Order issued here on 4-6-2023 and served on 4-6-2023.

Respondent, James Barrera (hereafter Respondent), by and through its attorney of record Whiting, Cotter & Hurlimann filed a timely and verified Answer to the Petition for Reconsideration dated 5-3-2023.

PETITIONER'S CONTENTIONS

Petitioner, State Of California Department Of Corrections; Richard A. Mcgee [McGee] Correctional Facility, hereafter Petitioner contends:

1. The evidence does not justify the Findings of Fact;
2. The Findings of Fact do not support the Order;
3. By the order, decision or award, the court acted without and in excess of its powers.

INTRODUCTION

An Application for Adjudication of Claim was filed on 7-27-2020, alleging injury to the ear, neck, circulatory system, digestive system including hearing, hypertension, cervical spine, right shoulder, bilateral elbows, right hand, lumbar spine, left hip, feet, gastrointestinal (GERD) as a result of a cumulative trauma claim extending from 11-5-1994 through 7-14-2020 (EAMS#33213667).

Parties utilized Dr. Prerna M. Khanna as a PQME (internal). Dr. Khanna's letterhead lists the following qualifications on her letterhead:

Diplomate of the American Board of Preventive Medicine in Occupational Medicine

Diplomate of the American Board of Internal Medicine

Diplomate of the American Board of Preventive Medicine in Preventive Medicine.

Dr. Khanna first evaluated the applicant on 3-13-2021 and issued her first report dated 4-27-2021 (Jnt Ex D) and her second on 6-25-21 (Jnt Ex C). A third report dated 12-10-21 discussed the issue of alleged "heart trouble" due to hypertensive disease concluding the echocardiogram results do

not meet the standard of "heart trouble" (pg 6). Dr. Khanna further concluded that the applicant did not have "an industrial-related illness for which a P&S determination is indicated" (pg 6).

The cross-examination of Dr. Khanna took place on 2-7-22 (Jnt Ex A). During the cross examination, Dr. Khanna indicated she had collaborated with a cardiologist in this case and when asked to identify the cardiologist, Dr. Khanna refused to disclose the identity of the cardiologist.

After filing a Petition alleging a Labor Code §4628 violation, the matter proceeded to trial. Defendant along with Dr. Khanna petitioned for costs and sanctions. Although the undersigned determined the actions of Dr. Khanna did not rise to the level of a §4628 violation, the undersigned did determine an additional panel in cardiology was warranted and that parties should bear their own costs, with no costs or sanctions awarded to defendant nor the PQME, Dr. Khanna.

DISCUSSION

Petitioner contends that the WCJ erred when determining that an additional panel in cardiology was warranted after determining Dr. Khanna did not violate Labor Code §4628. Furthermore, petitioner contends that respondent's actions were disingenuous and that sanctions and costs should be awarded. Finally, petitioner argues that their due process rights were violated when an additional panel was ordered.

Respondent asserts that Dr. Khanna violated §4628 when she refused to disclose the name of the cardiologist, and that they acted in good faith in filing their petition and therefore costs and sanctions should not be awarded.

GOOD CAUSE SHOWN TO WARRANT A PANEL IN CARDIOLOGY

Petitioner argues that pursuant to Rule 35.5 which provides that the QME must "address all contested medical issues…within the evaluator's scope of practice and areas of clinical competence" (Pet pg 3, ln 13) and that there was no good cause to issue an additional panel. It appears that Petitioner argues that Dr. Khanna, internal PQME was required to address all issues even outside of her expertise. On the other hand, Respondent contends that based on the actions of Dr. Khanna, the board has the power to order additional panels, and appropriately did so.

It is undisputed that Dr. Khanna confirmed she spoke to a specific cardiologist, nor that she also refused to disclose his name to the parties during her cross examination. As Dr. Khanna sought out an independent opinion on her own, this is no different if she had recommended a PQME in a different specialty or referred out for a consult, both of which as a Panel Qualified Medical Examiner she is entitled to do. By Dr. Khanna's own statements reflects she sought out a cardiologist to discuss medical protocols used in this case, and potentially discussed specific details of the applicant's condition, test results which she used to make her final determination. Dr. Khanna is a PQME in internal, yet she specifically sought out a cardiologist, whose name immediately came to mind when questioned. By reason of her actions, she without hesitation concluded there was a need for input from a cardiologist in order for her to make a "determination". It is well known that in cases where the issue is outside the expertise of the evaluator, another evaluator is appropriate. This is true, whether a primary treating physician and a secondary treating physician or a PQME referring to additional PQME in other specialties or even for a consultation.

Administrative Director (AD) Rule 31.7(b) provides for an additional QME panel in another specialty as follows in relevant part: (b) Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case.

In the instant matter, a dispute exists which required Dr. Khanna, an internal PQME to seek information from a cardiologist who provided some level of input. Whether a formal or an informal consult, as in this case, took place, parties have the right to have the consultant identified and the opportunity to question the doctor. Yet, parties were not allowed this opportunity as Dr. Khanna refused to disclose the identity of the cardiologist. Without this information, respondent was unable to further investigate the level of participation of the unidentified cardiologist and was precluded from conducting further depositions and/or discovery.

There is no doubt based on the facts as discussed above, that there is a showing of good cause that a panel of QME physician in a different specialty, cardiology is both reasonable and necessary. As in the absence of additional panel(s) in relevant specialties, applicant is effectively prevented from conducting the medical-legal discovery necessary to a determination the nature and extent of the injury. (*McClune v. Workers' Comp. Appeals Bd. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; Tyler v. Workers' Comp. Appeals Bd. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906* [the Appeals Board

has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues].) Based on the above, the undersigned is persuaded that QME evaluation in cardiology is reasonable and necessary.

RESPONDENT'S PETITION WAS NOT IN BAD FAITH

Petitioner further asserts that Respondent was disingenuous and acted in bad faith and should be sanctioned as well as ordered to reimburse parties for costs for filing a Petition alleging Labor Code 4628 violation. However, instead of providing factual information to support their position, Petitioner only provides their conclusion. Although Petitioner is correct that it appears no one other than Dr. Khanna wrote the report or evaluated the applicant, what is unclear is who Dr. Khanna consulted and the extent of their participation. Petitioner completely ignores what prompted respondent's concern, specifically Dr. Khanna's own statements.

Throughout her cross examination, Dr. Khanna referenced "we", when questioned, she acknowledged she discussed the case with a specific cardiologist who she refused to identify and who refused to be identified, preventing respondent the opportunity to inquire further and leaving respondent with mere speculation as to the degree of involvement of the unidentified cardiologist.

Hence, Respondent contends that their allegation of a §4628 violation was genuine and in good faith based on the actions of Dr. Khanna. It was only after referencing "we" during the cross examination, did Dr. Khanna disclose that she "talks to cardiologists, particularly when it comes down to cases where I need to make a determination" (Jnt Ex A, pg 30, ln 4)". When asked who she spoke to regarding this case, Dr. Khanna responded, "Do you want the name of the cardiologist?" When respondent responded in the affirmative, Dr. Khanna indicated "I don't know that I have permission to give his name. Could I ask him and get back to you?" Based on her response, Dr. Khanna immediately knew the cardiologist she discussed this case with. Considering, Dr. Khanna refused to disclose the name of the cardiologist and then went on to write an email to him requesting permission to share his name, then subsequently, receiving a response not allowing her to disclose the identity of the cardiologist, obviously would give rise to questions regarding her final determination.

Yet, Petitioner further argues that Respondent's actions are baseless and their actions cause further delays. However, it was Petitioner who failed to timely file their Cost Petition waiting to

the 2nd day of trial. The pre-trial conference statement filed on 7-11-2022 lists the issue "Defense asserts sanctions, fees & Costs against AA for filing instant petition. Defense to file petition ASAP" (EAMS#75699824). Yet, no petition was filed until the morning of the second date of Trial on 12-14-2022, even though the first date of trial was 10-25-2022. This was five months after the pre-trial conference statement was submitted. As the applicant has the burden of proving that an industrial injury occurred and considering when a claim and/or body part is disputed, it is almost always necessary to have a med-legal evaluation to address the same. Here, the designated PQME in internal sought out expertise from a cardiologist in order to make her determination and address causation. As there are multiple body parts at issue, an internal PQME is warranted. However, as there is a potential for "heart trouble" and the internal PQME was unable to provide a final determination without the assistance of a cardiologist. Based on an appropriate motion and showing of good cause, an additional PQME in cardiology is appropriate and warranted, and there was no bad faith actions on the part of applicant.

Additionally, by preventing respondent the opportunity to investigate, determine the level of participation or even knowing the identity of the cardiologist then deny him the ability to obtain an additional panel in cardiology, would be unfair and unjust. ".. the WCJ has broad discretion under the Labor Code and under our Rules relating to discovery "to issue such interlocutory orders relating to discovery as he determines are necessary to insure the full and fair adjudication of the matter before him, to expedite litigation and to safeguard against unfair surprise." (*Hardesty v. McCord & Holdren (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406]*.) Thus, the Order for an additional panel in cardiology is a reasonable relief.

DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED

Petitioner further argues that the Court violated petitioner's due process rights and there was no good cause to Order an additional panel in cardiology as applicant never sought a cardiac panel. Although, respondent did not specifically request a cardiology panel, respondent did seek a replacement panel as well as "all such relief this Court deems just and proper." However, as discussed above, it was the PQME in internal, Dr. Khanna who sought out the cardiologist and who has the ability to refer out to a different specialty. The only difference in obtaining a panel in cardiology, is that parties would know the identity of the cardiologist. Defense's arguments are without merit. Petitioner also argues that they are entitled to reimbursement of costs and

respondent should be sanctioned. Petitioner's arguments were unpersuasive. It is Petitioner's arguments that ignore the facts. There is no good cause that parties don't bear their own costs.

RECOMMENDATION

I recommend the Petition for Reconsideration, filed by State of California Department of Corrections; Richard A. Mcgee [McGee] Correctional Facility through their representatives of record, State Compensation Fund, adjusting agency State Contract Services on 5-1-2023 be DENIED on the merits.

DATE: 5-15-2023

JODY L. EATON

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE