WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RICHARD COCHRAN, ***Applicant***

vs.

ERICSSON, INC.; CHUBB, administered by CONSTITUTION STATE SERVICES, ***Defendants***

Adjudication Number: ADJ12190515
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant, Ericsson, Inc., filed a Petition for Removal in response to the October 3, 2023 Findings and Award (F&A)[1] issued by a workers' compensation administrative law judge (WCJ) allowing applicant to conduct the depositions of the Utilization Review (UR) physician, Dr. Lisa Pitino, and the person most knowledgeable (PMK) at Ericsson regarding applicant's earnings and earning capacity.[2]

Defendant contends that it will be significantly prejudiced and suffer irreparable harm if the depositions are allowed to go forward.

We received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal (Report), recommending that the Petition for Removal be denied.

We have reviewed the Petition for Removal (Petition), the Answer, and the contents of the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons stated below, we will grant defendant's Petition for Removal as one seeking reconsideration, and, as our

[1] While the WCJ's decision is titled Findings and Award, the Decision is in fact a Findings and Order, as no benefits were "awarded". For purposes of this Opinion, the decision will be referred to as a Findings and Award.

[2] Deputy Commissioner Lisa A. Sussman is substituted in for Commissioner Katherine Williams Dodd.

Decision After Reconsideration, we will rescind Finding of Fact No. 2 allowing the deposition of Dr. Lisa Pitino. Otherwise, we will affirm the October 3, 2023 F&A.

BACKGROUND

The WCJ's Report provides the following relevant factual background:

> The Applicant sustained an admitted injury on April 19, 2019 as a result of a fall. On July 25, 2022, a Utilization Review (UR) signed by Dr. Pitino issued, denying a request for authorization from [applicant's primary treating physician]. Applicant's counsel attempted to set the deposition of Dr. Pitino and initially contended that they did not know what items the doctor reviewed, if she understood the nature and extent of the applicant's injuries and if she signed the utilization review. A trial was held on these issues and it was found that the Applicant was not entitled to conduct the deposition as to the dispute regarding the review itself.…Applicant subsequently filed a Petition for Penalties [on] May 12, 2023 asserting that Defendants were circumventing the Utilization Review process as they disputed that the Utilization Review was signed by a doctor. Applicant re-set the deposition of Dr. Pitino…. Applicant also set the deposition of the person most knowledgeable for Ericsson in regards to wage information.

(Report, p. 2.)

On October 3, 2023, the WCJ issued the F&A, finding that there was good cause for applicant to depose both Dr. Pitino on the sole issue of whether she performed the UR as well as the PMK at Ericsson regarding applicant's earnings and earning capacity.

On October 30, 2023, defendant timely filed its Petition for Removal.

DISCUSSION

As a preliminary matter, the F&A issued in this instance is a final order. A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (*Rymer*) (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd*. (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd*. (*Maranian*) (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) 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].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra,* p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

A decision issued by a WCJ 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(s) 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 F&A includes a finding regarding a threshold issue, namely, injury AOE/COE. (F&A, p. 1.) Accordingly, the F&A is a final order subject to reconsideration rather than removal.

Although the F&A contains a finding that is final, defendant is only challenging interlocutory findings/orders in the decision regarding depositions, i.e., discovery matters. Therefore, we will apply the removal standard to our review. (See *Gaona, supra,* 5 Cal.App.5th at p. 662.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (*Cortez*) (2006) 136 Cal.App.4th 596 [71 Cal.Comp.Cases 155].) We will exercise our authority and grant removal only if the petitioning party shows that substantial prejudice and irreparable harm will result if removal is not granted, and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955; see also *Cortez, supra*.)

1. *Deposition of PMK regarding applicant's earnings and earning capacity*

Defendant contends that good cause does not exist to permit applicant to depose the PMK at its company regarding applicant's earnings and earning capacity. Defendant asserts that applicant's future earning capacity is irrelevant to applicant's permanent disability (PD) rate,

where, pursuant to Labor Code section 4659(c),[3] applicant's annual PD rate would be calculated using his average weekly wage during the year preceding his injury. (Petition, p. 4.) Defendant thus concludes that section 4659(c)[4] eliminates the need for the information sought via the deposition. The WCJ rejected defendant's argument, explaining:

> As to the issue if there is good cause for the Applicant to conduct the deposition of the person most knowledgeable (PMK) for Ericsson as to earnings and earnings capacity, it is found that there is good cause and that Applicant is entitled to conduct the deposition. The Applicant's earnings potential/capacity may be relevant to the issue of the applicant's disability rate.
>
> Defendant asserted that Labor Code Section 4659(c) eliminates the parties utilizing earning capacity for a PTD rate. Labor Code Section 4659 (c) discusses adjustments based upon [the state average weekly wage, or SAWW] *but does not preclude the Applicant from asserting higher earnings for a PTD rate based upon earning capacity. As the parties did not stipulate as to wages there may be a reasonable dispute as to the proper rate that the Applicant should be paid*. For example, Defendants did not assert that they would pay at the maximum rate and this may be an issue. Thus the deposition of the person most knowledgeable may lead to discoverable and relevant evidence.

(Opinion on Decision, p. 1, emphasis added.)

We do not disagree with the WCJ's opinion. Additionally, we note that the parties specifically set applicant's earning capacity at issue during trial. Specifically, the parties stipulated that applicant raised the application of section 4453(c)(4) as an issue for adjudication. (Minutes of Hearing (MOH), August 22, 2023, p. 2.) Section 4453(c)(4)[5] permits the use of earning capacity to calculate an applicant's average weekly wage if the other methods of computation listed in subsections (c)(1)-(3) cannot be reasonably and fairly applied. Because the application of section 4453(c)(4) was at issue, deposition testimony relating to applicant's earning capacity was clearly

---

[3] Section 4659(c) states: "For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" as compared to the prior year. For purposes of this subdivision, "state average weekly wage" means the average weekly wage paid by employers to employees covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred."

[4] All further statutory references are to the Labor Code, unless otherwise noted.

[5] Section 4453(c)(4) states: "Where...for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments."

relevant, and we see no error in the WCJ's decision to allow applicant to depose the PMK on this topic.

We again emphasize that removal is an extraordinary remedy that will only be granted if the petitioning party shows that substantial prejudice and irreparable harm will result if removal is not granted. (*Cortez, supra,* 136 Cal.App.4th 596; Cal. Code Regs., tit. 8, § 10955.) Here, we conclude that defendant failed to demonstrate that substantial prejudice or irreparable harm would result if applicant deposes the PMK at Ericsson regarding applicant's earnings and earning capacity. Therefore, we will not exercise our discretion to grant defendant the extraordinary remedy of removal on this issue.

2. *Deposition of Dr. Lisa Pitino*

Defendant also contends that significant prejudice and irreparable harm will result if applicant is permitted to depose Dr. Pitino to validate whether she performed the utilization review (UR). Defendant contends that there is no legal basis to depose Dr. Pitino; that it is unreasonable to burden the UR process by ordering the deposition, where statutory remedies for adverse UR decisions exist; and that applicant's Petition for Penalties alleging that the UR decision was signed by a non-physician working for Genex, the utilization review organization (URO) contracted by defendant, was simply a means to depose Dr. Pitino without establishing good cause.

In reviewing defendant's claim, we must first analyze applicant's stated objective in requesting the deposition. If applicant sought to depose Dr. Pitino to resolve a dispute regarding her UR decision[6] to deny requested treatment based upon medical necessity, the deposition would be barred outright. Section 4610 provides that, with the exception of timeliness, where there is a dispute regarding a UR decision, the dispute shall be resolved *only* by independent medical review (IMR), pursuant to sections 4610.5 and 4610.6. (Lab. Code, §§ 4610(i); 4610.5; 4610.6; *Aguilar v. Workers' Comp. Appeals Bd*. (2005) 70 Cal.Comp.Cases 885 (writ den.); *Dubon v. World Restoration, Inc*. (2014) 79 Cal.Comp.Cases 1298, 1307 (Appeals Board en banc) (writ den.) (*Dubon II*) ["There is no question that sections 4610 and 4610.5 provide that disputes over UR decisions shall be resolved by IMR."].)

[6] Section 4610.5(c)(3) provides: "Utilization review decision" means a decision pursuant to Section 4610 to modify or deny, based in whole or in part on medical necessity to cure or relieve, a treatment recommendation or recommendations by a physician prior to, retrospectively, or concurrent with, the provision of medical treatment services pursuant to Section 4600 or subdivision (c) of Section 5402. "Utilization review decision" may also mean a determination, occurring on or after January 1, 2018, by a physician regarding the medical necessity of medication prescribed pursuant to the drug formulary adopted pursuant to Section 5307.27.

However, applicant has previously stated that the requested deposition of Dr. Pitino "has nothing to do with [] medical necessity," and, of course, the scope of the deposition permitted by the WCJ did not include this topic. (Applicant's Petition for Removal, January 25, 2023, p. 9; F&A, October 23, 2023, p. 2.) Applicant sought the desired information through a petition for penalties and notice of deposition of Dr. Pitino as the Utilization Reviewer. Applicant, and the WCJ, identified one Appeals Board panel decision wherein the applicant was permitted to depose the UR physician to "prove up" her petition for penalties against defendant. Specifically, in *Fox v. Supreme Court I* (*Fox*) (October 12, 2007, SJO0254754) 2007 Cal. Wrk. Comp. P.D. LEXIS 138,[7] the applicant was permitted to depose the UR physician to "prove up" her petition for penalties against the defendant for allegedly failing to provide "reasonable and necessary medical care" to the applicant. Here, however, the purpose of the deposition is to dispel, or confirm, applicant's "suspicion" that the UR was "*prepared* by Genex and *not* the UR physician." (Applicant's Petition for Removal, January 25, 2023, p. 9, emphasis sic.) In other words, applicant's allegations do not relate to: 1) medical care, or 2) bad acts of defendant, but rather, of *Genex,* for allegedly engaging a non-physician to prepare the UR. Thus, *Fox* does not support applicant's request to depose Dr. Pitino in order to "prove up" the petition for penalties against defendant.

Based on the foregoing, we conclude that there was no legal basis for applicant to depose Dr. Pitino to validate whether she performed the UR. We will therefore grant reconsideration on this issue and rescind the portion of the F&A finding that good cause existed to allow applicant to depose Dr. Pitino on this topic.

We observe, however, that the Administrative Director (AD) is authorized to investigate allegations of UR violations and may assess significant monetary penalties upon employers and UROs for violations of UR processes, including a $25,000 penalty if the reviewer denying requested treatment is not a "licensed physician." (Lab. Code, § 4610(p); Cal. Code Regs., tit. 8, §§ 9792.9.1(e)(1), 9792.7(b)(2), 9792.11-9792.15.) These regulations incorporate due process requirements for employers and UROs that are under investigation by the AD. Clearly, if the AD was to investigate Genex and/or defendant for potential UR violations, these due process requirements would have to be satisfied. (Cal. Code Regs., tit. 8, §§ 9792.12, 9792.15.) We

[7] WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].)

emphasize that we are not issuing any decision as to whether Genex or defendant should be investigated by the AD. We simply wish to note that the Legislature has adopted various statutory remedies designed to protect the integrity of the UR process outside of underlying workers' compensation injury cases that do not include filing petitions for penalties and corresponding requests to depose the UR physician(s).

For the reasons stated above, we will grant the Petition as one seeking reconsideration, rescind Finding of Fact No. 2 allowing the deposition of Dr. Pitino to validate whether she performed the UR and otherwise affirm the October 3, 2023 Findings and Award/Order.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 3, 2023 F&A is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Richard Cochran, while employed on April 19, 2019 as a tower technician at Los Angeles, California by Ericsson, sustained an injury arising out of and in the course of employment to his spine, lower extremities, bowel, bladder, psyche, sexual dysfunction and lungs.

2. There is good cause for the deposition to be conducted of the person most knowledgeable (PMK) at Ericsson regarding the Applicant's earnings and earning capacity.

ORDER

It is ordered that the Applicant is allowed to conduct the deposition of the person most knowledgeable (PMK) at Ericsson regarding the Applicant's earnings and earning capacity.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 29, 2023

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

RICHARD COCHRAN
BENTLEY & MORE
FLOYD, SKEREN, MANUKIAN, LANGEVIN

AH/*cs*

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