

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

ROBERTO VELA, *Applicant*

vs.

**MARATHON PETROLEUM COMPANY;
OLD REPUBLIC INSURANCE, administered by SEDGWICK CLAIMS
MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ16546628
Marina del Rey District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of December 18, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained injury arising out of and in the course of his employment to his lumbar spine on March 21, 2022, and denied defendant's request that the matter go off calendar in order to obtain a pending Qualified Medical Evaluator (QME) report in a companion claim involving a cumulative trauma claim. Defendant contends that the opinion for the cumulative injury address all existing injuries before proceeding to trial; and its right to due process was violated when the WCJ proceeded with trial and issued a decision without the reporting.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition for Reconsideration.¹

¹ All statutory references are to the Labor Code unless otherwise noted.

FACTS

We will adopt and incorporate section II of the Report, which describes the facts of this case, as follows:

Applicant was employed as a Machinist for Marathon Petroleum on March 21, 2022 and sustained a specific injury on that date which consisted of a fall after tripping over a hose. Defendant accepted the claim and provided medical treatment to applicant with regard to a finger laceration on the date of the injury. Applicant testified that he reported to the clinic the following day and reported that he was having back pain. (Minutes of Hearing and Summary of Evidence, 12/7/2023, page 4, lines 7-8, EAMS Doc ID# 774497821) Applicant was eventually seen by Dr. Feiwell as a primary treating physician beginning in November of 2022, who determined that Applicant had sustained a cumulative trauma claim with regard to his back and not a specific injury, noting that he did not believe a single specific injury would cause the patient's significant findings. (Defendant's Exhibit A, 5/17/2023, page 10, 2nd paragraph, EAMS Doc ID 48103961) Based on Dr. Feiwell's report, Defendant denied benefits and treatment for Applicant's lumbar spine in connection to the specific date of injury. (Defendant's Exhibit J, 11/17/2022, 3rd paragraph, EAMS Doc ID# 49356836) Applicant was seen by Dr. Krishnareddy in his capacity as a Qualified Medical Examiner on February 20, 2023 who opined that Applicant's injury to his lumbar spine is mainly from the injury that he sustained when he fell at work. (Applicant's Exhibit 1, 5/4/2023, page 19, 3rd paragraph, EAMS Doc ID# 49306475) Applicant filed an Application for Adjudication of Claim alleging a cumulative trauma injury to his lumbar spine. (Defendant's Exhibit B, 3/27/2023, EAMS Doc ID# 49306476) Defendant denied the cumulative trauma claim based on not having substantial medical evidence finding Applicant sustained a cumulative trauma injury as a result of cumulative trauma to his back. (Defendant's Exhibit C, 4/12/2023, EAMS Doc ID# 49306477) Defendant then sought a Qualified Medical Panel in the cumulative trauma claim having now denied the lumbar spine as a body part in the specific date of injury and the entirety of the cumulative trauma claim which also includes the lumbar spine.

Applicant's counsel filed a declaration of readiness to proceed only on the specific date of injury which resulted in an MSC on November 1, 2023. The matter was set, over the objection of Defendant, for trial on AOE/COE on the specific claim only for body parts. No Petition to Remove was filed on behalf of Defendant to the matter being set for trial. The matter proceeded to trial on December 7, 2023 where this WCJ reviewed the Pre-trial Conference Statement with the parties, heard their respective arguments regarding discovery, and determined that the trial would proceed on the issues of parts of body, Defendant's request for OTOC based on the Qualified Medical Examiner in the cumulative trauma claim not being not being able to address both claims, and Applicant's designation of Dr. Haronian as PTP.

The record was opened, evidence was offered and ordered admitted, Applicant was the sole witness, and the matter thereafter stood submitted on December 7, 2023.

On December 18, 2023, the Court issued its Findings in which Applicant was found to have sustained injury to his lumbar spine as a result of the specific injury on March 21, 2023, Defendant's request for OTOC was denied, and the designation of Dr. Haronian as the primary treating physician was deferred.

It is only from the finding that Defendant's request for OTOC was denied that Defendant seeks reconsideration.

(Report, pp. 1-3.)

DISCUSSION

In *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Board en banc), the Appeals Board held en banc that the "Labor Code does not require an employee to return to the same panel QME for an evaluation of a subsequent claim of injury." (*Navarro, supra*, 79 Cal.Comp.Cases at p. 420.)

Considering section 4062.3(j) and section 4064(a) together, both sections state that a medical evaluation shall address "all medical issues arising from all injuries reported on one or more claim forms." Both sections refer to an injury reported on a claim form as the operative act, and not to a date of injury, a report of injury other than on a claim form, or the filing of an application with the WCAB. Under section 5401, an employer must provide a claim form and an injured worker must file a claim form with an employer. Hence, the reported date under sections 4062.3(j) and 4064(a) must be the filing date as defined by section 5401 because only section 5401 refers to filing a claim form. Because the date the claim form is filed with employer is the operative act, the date of filing of the claim form determines which evaluator must consider which injury claim(s).

(*Navarro, supra*, 79 Cal.Comp.Cases at pp. 423-424.)

The *Navarro* decision also held that the requirement in AD Rule 35.5(e) "that an employee return to the same evaluator when a new injury or illness is claimed involving the same parties and the same type of body parts is inconsistent with the Labor Code, and therefore, this requirement is invalid." (*Navarro, supra*, 79 Cal.Comp.Cases at p. 426.)

While parties are not precluded from agreeing to return to the same evaluator for subsequent claims of injury, based on the foregoing, we conclude that an employee may be evaluated by a new evaluator for each injury or injuries reported on a claim form after an evaluation has taken place. Thus, regardless of whether a subsequent claim of injury is filed with the same employer or a different employer and regardless of whether injury is claimed to

the same body parts or to different body parts, when a subsequent claim of injury is filed, the Labor Code allows the employee and/or the employer to request a new evaluator. In keeping with the limitations set forth in sections 4062.3(j) and 4064(a), at the time of an evaluation the evaluator shall consider all issues arising out of any claims that were reported before the evaluation, and if several subsequent claims of injury are filed before the evaluation by the new evaluator takes place, that one new evaluator shall consider all of those claims of injury.

(*Id.* at p. 425.) Therefore, under the principles outlined in *Navarro*, the selection of a different QME, Dr. Feldman, as the QME in the subsequent cumulative injury case was proper.

Applicant was seen by Dr. Krishnareddy in his capacity as a QME in this case pursuant to the QME process outlined in Labor Code section 4060 et seq., who opined that applicant's injury to his lumbar spine is mainly from the injury that he sustained when he fell at work. (Ex. 1, PQME Med. Rpt. by Dr. Krishnareddy dated 5/4/2023, p. 19.) Defendant seeks to rebut the QME's opinion with the report from Dr. Feldman in the subsequently filed cumulative trauma case.

“The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: (a) Reports of attending or examining physicians.” (Lab. Code, § 5703; see *Lorenz v. Encino Hosp. Med. Ctr.* (Aug. 21, 2014, ADJ7659456) [2014 Cal.Wrk.Comp. P.D. LEXIS 410].) We acknowledge that defendant was not barred from submitting a report by Dr. Feldman into evidence in this case. However, even if it had been available, Dr. Feldman's report would simply be additional evidence for the WCJ to consider and would not be treated as a QME report in the instant case. Here, the WCJ relied on the evidence before him, and we agree that the report would have had limited probative value.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 26, 2024

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

**ROBERTO VELA
FORD & WALLACH
LLARENA, MURDOCK, LOPEZ & AZIZAD**

JMR/ara

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