

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

SHARQUENT JACOBS, *Applicant*

vs.

TRIDENT MARITIME SYSTEMS; TRAVELERS DIAMOND BAR, *Defendants*

**Adjudication Number: ADJ15208827
San Diego District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant seeks removal or, in the alternative, reconsideration of the Findings and Order (F&O), of the workers' compensation administrative law judge (WCJ) issued on November 28, 2023, wherein the WCJ found in pertinent part that the reports of James Fait, M.D., obtained in applicant's concurrent Longshore and Harbor Workers' Compensation Act (LHWCA) case, may be provided to applicant's primary treating physician (PTP) and the Qualified Medical Evaluator (QME) in this Workers' Compensation proceeding.

Applicant contends that Dr. Fait's reports prepared pursuant to the provisions of 33 USC § 907(d)(4) in applicant's concurrent LHWCA case are not admissible before the Workers' Compensation Appeals Board pursuant to Labor Code¹ sections 4061(i) and 4062.2. Applicant contends that therefore, it would be error to provide Dr. Fait's reports to the PTP or QME in this workers' compensation proceeding.

We have not received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Removal and Reconsideration (Report) recommending that the Petition be dismissed to the extent that applicant seeks reconsideration and that it be denied to the extent that applicant seeks removal.

We have considered the allegations in the Petition and the contents of the Report with respect thereto. Based on our review of the record, and based on the WCJ's analysis of the merits

¹ All statutory references are to the Labor Code unless stated or otherwise required by context.

of the petitioner's arguments in the WCJ's Report, we will deny the Petition as one seeking reconsideration.

As stated by the WCJ:

Applicant, age 54, while employed on December 21, 2020, as a welder, at Lemon Grove, California, by Trident Maritime Systems, then insured as to workers' compensation liability by Travelers Property Casualty Company of America, sustained injury arising out of and in the course of employment to her right shoulder and right upper back and claims to have sustained injury arising out of and in the course of employment to her cervical spine, right wrist, lumbar spine, and right upper extremities.

The sole issue for trial was whether the IME reports of James Fait, M.D., obtained under the L&HWCA system may be served on the PTP and the QME for review, or if those reports are inadmissible pursuant to Labor Code section 4061, therefore, should not be reviewed by the PTP and QME in applicant's California workers' compensation case.

(Report, p. 2.)

Petitioner relies on *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256] in support of his position. Reliance on *Batten* is misplaced, however, as the case before us is factually distinguishable. The issue in *Batten* was the admissibility of a report of a privately retained physician offered solely for the purpose of rebutting the opinion of the QME. The court held that:

Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.

(*Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009, 1016 [80 Cal.Comp.Cases 1256].)

Section 4061(i) states as follows:

(i) No issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator. With the exception of an evaluation or evaluations prepared by the treating physician or physicians, no evaluation of permanent impairment and limitations resulting from the injury shall be obtained, except in accordance with

Section 4062.1 or 4062.2. Evaluations obtained in violation of this prohibition shall not be admissible in any proceeding before the appeals board.

(Lab. Code, § 4061(i).)

Here, Dr. Fait's reports are not those of a treating physician, an agreed medical evaluator, or a qualified medical evaluator, as contemplated by section 4061(i), nor are they the reports of a consulting physician. Perhaps most relevant to the analysis in *Batten*, however, is that Dr. Fait was not privately retained solely for the purpose of rebutting the opinion of the QME in this case.

With respect to what medical records may be provided to a PQME, section 4062.3 provides in relevant part, as follows:

(a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:

(1) Records prepared or maintained by the employee's treating physician or physicians.

(2) Medical and nonmedical records relevant to determination of the medical issue.

(Lab. Code, § 4062.3(a).)

As stated by the WCJ in her report:

Section 4062.3(a) permits any party to provide to the medical-legal evaluator medical records "relevant to determination of the medical issue." This language is fairly broad. Dr. Fait evaluated Applicant's cervical spine and right shoulder in regards to her claimed industrial injury in her concurrent longshore case. IME Fait's reports are relevant to determination of the medical issues in Applicant's California workers' compensation claim and should be provided to the QME and primary treating physician for comment.

(Report, p. 6.)

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).) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" or determines a "threshold" issue that is fundamental to the claim for benefits. (*Rymer v. Hagler* (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]; *Maranian v. Workers' Comp. Appeals Bd.* (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, 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*, at 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at 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 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 on threshold issues, including the finding that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her right shoulder and right upper back. 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. Although the decision contains a finding that is final, petitioner is only challenging an interlocutory finding/order in the decision. 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, § 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, based upon the WCJ's analysis of the merits of the petitioner's arguments, 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.

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

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration/Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 20, 2024

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

**SHARQUENT JACOBS
LAW OFFICE OF ROBERT MCLAUGHLIN
MARRIOTT & ASSOCIATES**

JB/cs

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