WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NOVELLA NOBLE, *Applicant*

vs.

ASCENA RETAIL GROUP, INC.; SAFETY NATIONAL CASUALTY CORP., administered by SEDGWICK CLAIMS MANAGEMENT, *Defendants*

Adjudication Number: ADJ13490319
Riverside District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on July 20, 2021.[1] By the Findings, the WCJ found in relevant part that applicant is not entitled to a second qualified medical evaluator (QME) panel.

Applicant contends that she is entitled to a new QME panel for a claim form subsequently filed after her evaluation with the orthopedic QME per *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Board en banc).

We received an answer from defendant. The WCJ issued a Report and Recommendation of Judge on Petition for Reconsideration (Report) recommending that we deny the Petition.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant reconsideration and amend the Findings to find that there is insufficient evidence to address whether applicant improperly obtained a

---

[1] The WCJ designated defendant's attorney to serve the Findings and cited the Appeals Board's March 18, 2020 In Re: COVID-19 State of Emergency En Banc (Misc. No. 260) for emailing the Findings only to defendant's attorney and designating service. In the en banc decision, the Appeals Board suspended WCAB Rule 10628, which requires service by the WCAB by mail unless a party has designated email for service. (Cal. Code Regs., tit. 8, § 10628.) The decision stated that service by the WCAB may be made electronically with or without parties' consent, but did not state that the WCAB may designate a party to serve a final decision, order or award. The district offices should still serve all parties of record with a final decision, order or award (whether electronically or otherwise), not designate a party to serve.

second QME panel (Finding of Fact No. 4). We will also add an order for development of the record on this issue.

FACTUAL BACKGROUND

Applicant initially filed a DWC-1 claim form dated March 6, 2018 with the date of injury stated as "CT: 10/03/17-11/2/17" to the "right knee, RLE." (Joint Exhibit No. 6, DWC-1 Claim Form, March 6, 2018.) An Application for Adjudication of Claim was filed by applicant's attorney for this claim on March 13, 2018. (Joint Exhibit No. 5, Application for Adjudication of Claim, March 13, 2018.) The claim was assigned case number ADJ11233436.

An orthopedic QME panel was obtained to address ADJ11233436. (Joint Exhibit No. 9, Panel List by the DWC, June 11, 2018.) G. Sunny Uppal, M.D. was the resulting QME from this panel and evaluated applicant in 2018. (Joint Exhibit No. 1, QME Report by Sunny Uppal, M.D., August 6, 2018.) Dr. Uppal opined that applicant's right knee condition resulted from a specific injury on October 3, 2017 and "did not report any complaints or history consistent with a cumulative trauma injury." (Joint Exhibit No. 3, QME Report by Sunny Uppal, M.D., October 2, 2018, p. 4.) Dr. Uppal attributed causation for applicant's right knee condition to the October 3, 2017 specific injury. (Joint Exhibit No. 2, QME Report by Sunny Uppal, M.D., August 13, 2019, p. 2.)

Case number ADJ11233436 was scheduled for trial on August 13, 2020. The Minutes for the trial date state in handwriting in the comments: "With waiver of LC § 5313 and discussing the case with the attorneys and in the presence of applicant, applicant agrees to dismiss this case with prejudice. Based on the foregoing, this case is hereby dismissed with prejudice." (Minutes of Hearing, August 13, 2020.)

Also on August 13, 2020, applicant filed a new Application for Adjudication of Claim alleging a specific injury on October 3, 2017 to the right knee and other body parts. (Joint Exhibit No. 13, Application for Adjudication of Claim, August 13, 2020.) A DWC-1 claim form dated August 13, 2020 for this injury was filed with the Application.[2] This claim was assigned ADJ13490319 and has apparently been denied by defendant.

[2]The 2020 DWC-1 claim form was not part of the evidence admitted into the record at trial. We take judicial notice of this claim form in the Electronic Adjudication Management System (EAMS). (See *Faulkner v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 1161 (writ den.) [the Court of Appeal found that the WCAB may take judicial notice of the DWC-1 claim form even if it has not been admitted into evidence].)

A QME panel was issued in pain medicine for the specific injury claim on September 14, 2020 at applicant's attorney's request. (Joint Exhibit No. 8, Panel List by the DWC, September 14, 2020.)

The matter proceeded to trial on June 23, 2021 on the following issues:

> 1. Whether applicant's claim of injury is barred by statute and case law, including Labor Code Section 5303 Anti-Merger.
>
> 2. Statute of Limitations and untimely notice in filing as alleged per Labor Code Section 5412.
>
> 3. In the event that applicant's claim is not barred, whether applicant improperly obtained a QME panel.
>
> (Minutes of Hearing and Summary of Evidence, June 23, 2021, p. 2.)

The WCJ issued the Findings wherein he found that the claim is not barred by the statute of limitations and Labor Code[3] section 5412, the claim is not barred by section 5303 and the anti-merger statutes, and applicant is not entitled to a second QME panel.

DISCUSSION

I.

The WCJ in his Report raised the issue of whether the Findings constitute a final decision subject to reconsideration. 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 (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].) 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.

[3] All further statutory references are to the Labor Code unless otherwise stated.

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.

The Findings included a finding that applicant's claim is not barred by the statute of limitations. This is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.[4]

II.

Although the Findings contain a finding that is final, applicant only challenges the WCJ's finding that she is not entitled to a second QME panel. This is an interlocutory decision and is subject to the removal standard rather than reconsideration pursuant to the discussion above. (See *Gaona*, *supra*.)

Removal is discretionary and is generally employed only as an extraordinary remedy which must be denied absent a showing of significant prejudice or irreparable harm, or that reconsideration will not be an adequate remedy after issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, § 10955(a); *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].)

Section 4060 provides as follows in relevant part:

> If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.
>
> (Lab. Code, § 4060(c).)

Section 4062.3 separately provides in relevant part:

> (j) Upon completing a determination of the disputed medical issue, the medical evaluator shall summarize the medical findings on a form prescribed by the

[4] Reconsideration was not sought by defendant and applicant did not challenge the other findings of fact. Therefore, we will not disturb the other findings of fact on the other issues in dispute.

> administrative director and shall serve the formal medical evaluation and the summary form on the employee and the employer. **The medical evaluation shall address all contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's initial appointment with the medical evaluator.**
>
> (k) If, after a medical evaluation is prepared, the employer or the employee subsequently objects to any new medical issue, the parties, to the extent possible, shall utilize the same medical evaluator who prepared the previous evaluation to resolve the medical dispute.
>
> (Lab. Code, § 4062.3(j)-(k), emphasis added; see also Cal. Code Regs., tit. 8, § 35.5(c)(1) [also providing that the evaluator shall address all contested medical issues arising from all injuries reported on one or more claims forms before the appointment].)

The parties in this matter dispute whether applicant was entitled to obtain a second QME panel for her 2020 claim form for the specific injury per the Appeals Board's en banc decision, *Navarro*. In *Navarro*, the Appeals Board held 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.) Accordingly, the decision "conclude[d] 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." (*Id.* at p. 425.) The "date the claim form is filed with employer is the operative act" and thus, this date "determines which evaluator must consider which injury claim(s)." (*Id.* at p. 424.)

In this matter, applicant was evaluated by the orthopedic QME Dr. Uppal for the cumulative trauma claim in 2018. The DWC-1 claim form for the specific injury was filed in 2020. Pursuant to *Navarro*, either party was entitled to request another QME panel for this claim form since it was filed subsequent to the evaluation with Dr. Uppal.

Our analysis here is mandated by *Navarro* and the Labor Code, although the record in this matter reveals conduct that is disconcerting. The decision in *Navarro* recognized "that unfortunately, a subsequent claim of injury could be filed by an employee or an employer with the goal of 'doctor-shopping,' potentially leading to increased medical-legal costs and delays." (*Navarro*, *supra*, 79 Cal.Comp.Cases at p. 428.) The decision further reminded "all participants that it is constitutionally required that workers' compensation proceedings be expeditious." (*Id.*) It is unclear why applicant did not simply amend her cumulative trauma injury claim to be a specific injury claim to conform to proof upon receipt of Dr. Uppal's opinions. (See e.g., Cal.

Code Regs., tit. 8, § 10517.) Dismissing the cumulative trauma claim while simultaneously filing a new claim form for the specific injury and requesting a new QME panel does not have an aboveboard appearance to it, though we are not prepared to conclude that it rises to the level of bad faith. The parties are reminded that workers' compensation proceedings are required to be expeditious and that protracted litigation generally inhibits progress towards a claim's resolution.

Although we conclude that either party had the right to request a new QME panel for the 2020 claim form, the only evidence in the record regarding the pain medicine QME panel is the panel list itself. We are unable to address the issue of whether applicant improperly obtained this panel in the absence of documentation in the record regarding her panel request. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be based on admitted evidence in the record]; see also Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

The Appeals Board has the discretionary authority to develop the record when the record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) Upon return of this matter to the trial level, we recommend the trier of fact create a complete evidentiary record regarding the QME panel dispute and issue a new decision. Either party may then challenge that decision.

Therefore, we will grant reconsideration and amend the Findings to find that there is insufficient evidence to address whether applicant improperly obtained a second QME panel (Finding of Fact No. 4). We will also add an order for development of the record on this issue.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on July 20, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued by the WCJ on July 20, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. There is insufficient evidence to address whether applicant improperly obtained a QME panel.

ORDER

IT IS ORDERED that the record must be further developed on whether applicant improperly obtained the QME panel.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ AMBER INGELS, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 11, 2021

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

ALBERT & MACKENZIE
NOVELLA NOBLE
SHATFORD LAW

AI/*pc*

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