WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MANUEL ESPINOZA, ***Applicant***

vs.

BROWNING FIRE PROTECTION, INC.; CALIFORNIA CONTRACTORS NETWORK, administered by AMERICAN CLAIMS MANAGEMENT, ***Defendants***

Adjudication Numbers: ADJ14200347; ADJ13242018
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration 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 below, we will deny reconsideration in both cases.

Case No. ADJ14200347

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 in Case No. ADJ14200347 includes a finding regarding employment, a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision regarding discovery. 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 in the 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.

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

Case No. ADJ13242018

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 reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 10, 2022

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

MANUEL ESPINOZA
LAW OFFICES OF ROBERT OZERAN
DIETZ, GILMOR & CHAZEN

PAG/*pc*

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

ADJ14200347

BACKGROUND:

Defendant has submitted a timely verified Petition for Reconsideration contending that the evidence does not justify the findings of fact and that the findings of fact do not support the decision. The Court's findings pertinent to the Petition were that Applicant "*claims to have sustained injury arising out of and in the course of employment in the form of Covid 19 involving his respiratory and internal systems*" and that "*The medical evidence in this matter is insufficient to render a decision on causation*."

Consequently, it was ordered that "*this case requires further development on the disputed issue of injury, and Applicant shall request a QME panel under Labor Code section 4060 from the Medical Unit*."

FACTS:

Applicant was diagnosed with Covid-19 and alleged that he was exposed to the virus at work. Defendant denied the claim on the basis that there was no evidence of any other employees with Covid working near Applicant. The Court did not find the statutory presumption to be applicable.

At trial, Applicant testified that

> *He believes it happened on or around July 3rd. That day he went to work, and he was fine. But during the day, he developed a fever and body aches and shortness of breath. When he got home, he was sick, and he went to the hospital where a test was done indicating that he was positive for Covid. He was admitted into the hospital that day. According to Mr. Espinoza, he thinks two co-workers, Mr. Ruiz and Mr. Candelario, also got Covid around the same time.*
> [6/9/22 SOE P3, L23-25; P4, L1-2].

> *There were some co-workers who tested positive before him, perhaps one other, but he thinks all of them were pretty much sick around the same time. He does not know of any person who was sick before him, but he heard at other places, people were ill. He thinks the virus was spread by a driver who delivered things to the company.*
> [6/9/22 SOE, P5, L10-17]

The employer's witness explained that Mr. Espinoza did take off work in July of 2020 [6/9/22 SOE, P8, L1-2]. In fact, the witness indicated neither she nor anyone else in the company knew that the Applicant had Covid until he returned from the hospital with a clean Covid test. [6/9/22 SOE, P8, L1-5]. Most importantly, and contrary to Applicant's speculation, the employer's witness confirmed that there was no outbreak, that is, no other employees had Covid in July of 2020 or before that date [6/9/22 SOE P8, L2-3]. She said the only other Covid case in the company occurred a couple of months later with another employee [6/9/22 SOE P8, L3].

DISCUSSION:

There was evidence to support Applicant's claim that he was diagnosed with Covid, namely a reference in records reviewed by the ortho QME, Dr. Elias, from James A. Sharkoff, M.D. / Pueblo Medical Center, indicating that on July 31, 2020 Applicant was seen for and diagnosed with Covid 19 pneumonia [Ex Y, P5]. However, as the Court noted, factual evidence of exposure to Covid at work was non-existent. In addition, there was an absence of medical opinion on the issue of causation.

Believing that the record needed development on the issue of causation, the Court stated, "*the Court believes the facts present a medical question best addressed by a physician, especially since the statutory presumption appears not to apply.*" [OPINION, P7].

Petitioner argues that it would be impossible for Applicant to contract Covid on the date he alleged because employer's records indicate he didn't work that day. But Applicant did testify the July date initially alleged was inaccurate, and that he came down with Covid—and was found to be positive—on July 3, 2020, after which he was hospitalized [6/9/22 SOE, P3, L23-24; P4, L1; P6, L18].

Petitioner also argues that a decision on compensability—specifically a finding of no injury—should have been made based solely on the testimony of the employer's witness about the absence of other Covid cases at the workplace around the time Applicant got sick. Admittedly this evidence carries a lot of weight but isn't dispositive of the issue. What is missing is a medical opinion about the probability of his Covid illness being related to his employment. This would likely need a physician to review Applicant's hospitalization and treatment record, especially the history he divulged before the onset of litigation.

It would be improper to make a finding of injury without medical substantiation, just as it would be improper to find no injury without medical substantiation of that fact. A physician might determine that based upon the facts presented by the employer Applicant's illness with Covid-19 wasn't related to his job. But, such a determination must be based on medical probability in light of the facts. There should be a link between the factual assertions concerning the claim of

injury and the assertions about the cause of injury by medical opinion. [*Western Growers Ins. Co. v. WCAB* (1993) 58 CCC 323]. Expert medical evidence is required to establish industrial causation by a reasonable medical probability [*McAllister v WCAB*, 33 CCC 660 (1968)]. Likewise, medical probability is required for an adverse finding as well. Neither Applicant's nor the employer's testimony is a substitute for medical proof [*Bstandig v. WCAB*, 42 CCC 114 (1977)]. Again, the record needs to be developed further.

Lastly, the Court's decision to obtain a medical opinion to address "injury" is not a "final" decision, but is procedural and interim in nature. Consequently, a Petition for Reconsideration is not the proper vehicle to attack the Court's decision. A Petition for Removal would be, and that requires a showing of prejudice to be successful. However, there is neither irreparable harm nor substantial prejudice here. Moreover, the petitioner hasn't demonstrated that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues.

RECOMMENDATION:

It is respectfully recommended that the Petition for Reconsideration be denied, or if considered a Petition for Removal, that it also be DENIED.

ADJ13242018

BACKGROUND:

Defendant has submitted a timely verified Petition for Reconsideration contending that the evidence does not justify the findings of fact and that the findings of fact do not support the decision.

The Court found after trial that Applicant sustained injury to his right wrist, but not to his neck. Defendant argues that the evidence does not support the finding of a wrist injury.

FACTS:
According to the Applicant, he was injured in July 2019 when installing sprinklers while on scaffolding about 20 feet high when "*a piece of metal fell, and he grabbed it to protect the electrician who was below him. In doing so, he hurt his right hand*" [SOE P2, L24-25; P3, L1-2].

The employer's representative said she found out about the event sometime after it occurred [SOE P8, L8-9]. She said Applicant reported it about two weeks after the event [SOE P12, L6-7]. Although a co-employee, Mr. Sotelo, denied the event happened [SOE P8, L11; P11, L11], she did confirm that the event occurred:

> *She spoke to the supervisors for the applicant, who told her that a wrench apparently fell after being dropped by another employee, and the applicant caught it, or it hit him and hurt his hand and wrist.*
> [SOE P8, L9-10].

Applicant was sent for medical attention, although he never brought back any documentation, as would normally be the case [SOE P11, L12-14]. About a year later, Applicant was still having problems and was sent to physicians at Concentra where the following history was obtained:

> *Patient works as a pipe fitter. Mechanism of injury: on 06/16/2019, Manuel B. Espinoza was at work erecting external scaffolding. He held it w/ his R hand and a coworker let go and the falling scaffolding hyperextended his R wrist. Location of pain: Rwrist. . . . Patient has been referred to physical therapy.*
> [Ex 1, P1]

A physician at Concentra noted Applicant's visit on 6/10/20, presenting with a piece of metal in his wrist from an injury on 7/16/19 [Ex 4, P1] or that a piece of metal slipped onto his wrist on 7/16/19 [Ex 16, P1]. Mr. Espinoza was diagnosed with a wrist strain [Ex 1, P3; Ex 16, P2] and he was returned to modified duties [Ex 2, P1; Ex 16, P3].

The PQME later also diagnosed a wrist strain [Ex V, P5]. An MRI disclosed some structural damage to the wrist [Ex 14]. In May 2021, an MRI of the wrist read by Dr. Amirhamzeh disclosed positive findings related to degeneration and tear of ligaments [EX 14].

The PQME, Dr. Elias, stated

> *With regard to the right wrist, this patient had an injury in which a piece of scaffold fell on his right wrist on July l 6, 2019 hyperextending the wrist. His current impairment with the right wrist is 100% caused by and apportioned to the industrial injury which occurred on July 16, 2019.*
> [Ex Z, P1].

Applicant said the hand still hurts, and he takes Tylenol for the pain [6/9/22 SOE, P4, L12-13].

DISCUSSION:

Petitioner places undue emphasis on the Court's comments in a companion case about Applicant not being credible, and inflating that comment to apply to everything Applicant said in his other cases, including this one.

Finding a lack of credibility doesn't always mean the witness is completely untruthful. Credibility isn't always about truthfulness, but it is about reliability. A witness who testifies truthfully based on his or her belief or recollection may still be less than a credible witness when extraneous details show the facts to be other than that to which he or she testified based on recollection. Testimony may be unreliable in one area, and very reliable in another.

Secondly, the Court's credibility assessment was solely with respect to the history provided in that other case for a different event that allegedly occurred on January 1, 2018, and was not about the Applicant's testimony related to this case. Specifically the Court's comment, made after reciting a number of inconsistencies in Applicant's history compared to other testimony or medical documentation about that other event, was "*Simply, given the foregoing, Mr. Espinoza's credibility* *with respect to this event* *is questionable* (emphasis added)" [OPINION in ADJ13242001, Discussion, P5].

With regard to the present case, Applicant's testimony is fairly consistent. He said a piece of metal fell and he caught it; he told the doctors that a piece of metal, or a piece of the scaffolding fell. It was supervisory personnel who thought it was a wrench that fell—and if it wasn't a wrench then the denial by the co-worker that he didn't drop a wrench is not inconsistent with Applicant's story.

Petitioner also places emphasis on the lack of documentation from the initial medical visit arranged by the employer. Petitioner's assertion that the lack of early medical documentation dooms Applicant's claim is unavailing. The employer's witness said Applicant didn't bring back any paperwork, which normally would occur. However, her testimony confirms she sent him for medical attention, and if the need for documentation of that was so vital, she could have (but apparently didn't) attempt to get it directly from the medical provider. Moreover, the subsequent medical attention confirms the existence of damage to Applicant's wrist consistent with the mechanism of injury he described. As was pointed out in the Opinion at page 5,

> *However, treatment reports from Concentra reflect no conflict between the nature of the wrist condition and the description of the event that reportedly caused it. Although the medical reporting is a year subsequent to the event, there is no indication or evidence of any other event—at work or otherwise—that would explain the wrist injury. The diagnosis is consistent with the description of the event. Importantly, defense witness said she received corroboration of the incident from Applicant's supervisors, contrary to a co-employee's denial of the event. This corroboration and the medical reports tip the scales in favor of Applicant.*

RECOMMENDATION:

For the foregoing reasons it is respectfully recommended that the Petition for Reconsideration in ADJ13242018 be DENIED.

DATE: August 10, 2022
Marco Famiglietti
WORKERS' COMPENSATION JUDGE