WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FERNANDO FELIX, *Applicant*

vs.

DPR CONSTRUCTION, INC. and NATIONAL FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, administered by AMERICAN INTERNATIONAL GROUP, INC., *Defendants*

Adjudication Number: ADJ12202655
Long Beach District Office

OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION

Defendant seeks reconsideration of the Opinion and Order Granting Petition For Reconsideration and Decision After Reconsideration (prior Decision) issued by the Workers' Compensation Appeals Board (Appeals Board) on April 5, 2021, wherein we rescinded the January 12, 2021 Findings of Fact and Orders (F&O), and returned the matter to the WCJ for further proceedings.

Defendant contends that it was improper for the Appeals Board to rescind the F&O and return the matter to the WCJ for development of the record; and that the F&O should be affirmed.

We have considered the allegations in the Petition for Reconsideration (Petition). Based on our review of the record, for the reasons discussed in our prior Opinion, which we incorporate by this reference thereto, and for the reasons discussed below, we will dismiss the Petition.

DISCUSSION

A petition for reconsideration may only be filed against a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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* (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, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v.*

Workers' Comp. Appeals Bd. (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, are not considered "final" orders. (*Maranian, supra*, p. 1075 [65 Cal.Comp.Cases at p. 655] ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"); *Rymer, supra*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals* (*Kramer*), *supra*, 82 Cal.App.3d at p. 45 ("[t]he term ['final'] does not include intermediate procedural orders").)

In our prior Decision we explained that the reports from the reporting physicians do not constitute substantial evidence and it is necessary that the record be further developed to clarify the issue of injury arising out of and occurring in the course of employment (AOE/COE). We again note that the trial record did not contain substantial evidence regarding the issue of whether applicant sustained a cumulative injury AOE/COE. Our prior Decision does not determine the substantive rights or liabilities of either party and as such it is not a final order. Thus, the Petition is dismissed.

We also note that if defendant had filed a Petition for Removal, the petition would be denied. Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez*, s*upra; 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, defendant has not shown that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to defendant. Therefore, if the petition had sought removal it would have been denied.

Accordingly, we dismiss defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on April 5, 2021, is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 21, 2021

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

FERNANDO FELIX
GATEWAY PACIFIC LAW
LENHAN SLATER

TLH/*pc*

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

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 12, 2021, wherein the WCJ found in pertinent part that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to his bilateral knees.

Applicant contends that the report from primary treating physician (PTP) Perry R. Secor, M.D., and applicant's trial testimony are substantial evidence that he sustained an industrial injury to his knees, and that the report from orthopedic qualified medical examiner (QME) Steve Hwang, M.D., is not substantial evidence as to that issue.[1]

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his bilateral knees while employed by defendant as a drywall taping superintendent during the period from May 18, 2017, through May 18, 2018.

On November 14, 2019, applicant was evaluated by QME Dr. Hwang. (Def. Exh. A, Dr. Hwang, December 13, 2019.) Dr. Hwang examined applicant, took a history, and reviewed the medical record. He initially indicated that applicant had been employed by defendant:

> … since May 5, 1997 through last day of employment of August 26, 2018 when he was laid off. As a drywall applicator, he would carry tools all day long that weighed about 60 pounds. He would put a drywall to finish. He claimed pain started 10 years ago and now it is getting worse.
> (Def. Exh. A, p. 4.)

[1] We note that applicant's counsel refers to reports from Dr. Secor that were not offered and/or accepted into evidence. (see Petition, p. 3, lines 12 – 24.) The references to those reports will not be considered and counsel is reminded that such conduct may be deemed sanctionable.

Dr. Hwang then noted that in the cover letter, defense counsel stated:

> Please note that these records indicate that Applicant has struggled longstanding bilateral knee issues from at least 2009. Applicant has been diagnosed with severe tri-compartment osteoarthritis in both knees, and has been complaining of bi-lateral lower leg and joint pain since early 2012. Further, applicant underwent a repair for a meniscal tear in his right knee in October of 2012. Applicant was deemed a candidate for total knee replacement in his right knee since 2011. Additionally, Applicant has been diagnosed with a 3.9 cm popliteal cyst in his left knee.
> (Def. Exh. A, p. 5.)

In the Occupational History section of the report Dr. Hwang stated that:

> The applicant worked at the DPR Construction. His work is taping, superintendent, HR, manpower, tool repair, and work out in the field. He was working from May 1997 to August 26, 2018.
> (Def. Exh. A, p. 40.)

Dr. Hwang diagnosed applicant as having degenerative joint disease and degenerative arthritis in both knees (Def. Exh. A, p. 42), and concluded:

> It is this examiner's opinion the degenerative changes of the [right] knee joint occur at such a young age that the applicant's pain and disability of the applicant's knees were caused by congenital factor, the valgus position of the applicant's right knee and obesity. ¶ It is this examiner's opinion that [sic] applicant's claim of right knee pain and disability were not reasonable probable industrial related from continuous trauma as described by the applicant. ¶ The disability and pain of the applicant's left knee, which required surgical procedure of arthroscopy, was also caused by hereditary factors and overweight condition of applicant.
> (Def. Exh. A, p. 42.)

On July 16, 2020, applicant was seen by his PTP, Dr. Secor. After examining applicant, including both knees, Dr. Secor recommended that applicant return in two weeks for bilateral knee aspirations under ultrasound guidance. Regarding the cause of applicant’s knee condition, Dr. Secor stated:

> He filed for a worker's compensation claim due to his knee problems. He was seen by Dr. Steve Hwang for a QME evaluation. I had the opportunity to review the QME report of December 13, 2019. Dr. Hwang opined that he did not have any work related contribution to his arthritis in his knees. I respectfully disagree with

this opinion. He has worked for over 20 years performed arduous work in the construction industry. This required him to do prolonged walking and standing over uneven terrain. It is medically probable that a significant contribution to his knee arthritis was caused by his industrial exposure because of cumulative trauma.
(App. Exh. 1, Dr. Secor, July 16, 2020, p. 5.)

The parties proceeded to trial on November 12, 2020. Applicant testified about his job duties as a drywall taping superintendent. The WCJ's summary of applicant's testimony includes the following:

The bazooka was a tool used to apply drywall. It weighed 10 pounds. With material, it weighed 50 pounds. Throughout the day, he had to bend over to use it. He used the bazooka daily. … ¶ … He worked on drywall joints every day. This required bending at the knees. He had to bend at the knees daily. He was required to lift items over 20 to 30 pounds on a daily basis. He climbed ladders 40 to 50 times per week because there was a ladder on the scaffolding. He had to lift things when climbing the ladders. Those items weighed 50 pounds. The pump was 15 pounds. The bazooka was 30 pounds. He would have to climb scaffolding regularly on a typical day. This was consistent 60 percent of the time while working for the employer.
(Minutes of Hearing and Summary of Evidence (MOH/SOE), November 12, 2020, p. 6.)

DISCUSSION

An award, order or decision by the WCAB must be supported by substantial evidence in light of the entire record. (Lab. Code §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on information that is not accurate, on facts no longer germane, on incorrect legal theories, or on surmise, speculation, conjecture, or guess, and the medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

In his Report the WCJ explained that:

Dr. Secor did not have an adequate discussion of the applicant's job duties or his work history (Exhibit 1). The report attributed the

> Applicant's injuries to his knees to walking over uneven surfaces (Exhibit 1). The report did not reference any of the job duties that the Applicant testified to at trial. Further, it was clear that the report of Dr. Secor did not adequately discuss causation or acknowledge the date of the alleged continuous trauma period.
> (Report, p. 3.)

Based on our review of the record, we agree with the WCJ that Dr. Secor did not have an accurate description of applicant's job duties, and in turn his report is not substantial evidence.

Also, in regard to the report from QME Dr. Hwang, the doctor stated that applicant had been employed by defendant as a drywall applicator from May 5, 1997, to August 26, 2018, and that, "As a drywall applicator, he would carry tools all day long that weighed about 60 pounds." (Def. Exh. A, p. 4.) "His work is taping, superintendent, HR, manpower, tool repair, and work out in the field." (Def. Exh. A, p. 40.) We first note that Dr. Hwang's description of applicant's job duties and the physical demands of his work are inconsistent with applicant's unrebutted trial testimony. (MOH/SOE, p. 6.) Similar to the problem with Dr. Secor's report, as discussed by the WCJ, Dr. Hwang did not reference any of the job duties that applicant testified to at trial. Further, although Dr. Hwang stated his conclusion that applicant's work was not a contributing cause of his right and left knee conditions, the doctor provided no reasoning or analysis explaining his conclusion. Further, even if his description of applicant's job duties was accurate, Dr. Hwang did not explain, or discuss, his conclusion that carrying "60 pounds" of tools "all day long" while employed by defendant from May 1997, to August 26, 2018, did not in any way contribute to, or aggravate applicant's degenerative joint disease and/or his degenerative arthritis. In that Dr. Hwang's opinions appear to be based on an inaccurate understanding of applicant's job duties, and that he provided no explanation or reasoning for his conclusions, his report does not constitute substantial evidence and cannot be the basis for determining the issue of injury AOE/COE.

When deciding a medical issue, such as whether the applicant sustained a cumulative trauma injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) As discussed above, the reports from Dr. Secor and Dr. Hwang do not constitute substantial evidence. Thus, the trial record does not contain substantial evidence regarding the issue of whether applicant sustained a cumulative injury AOE/COE.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-

1122 [63 Cal.Comp.Cases 261].) In this matter, it is necessary that the record be further developed to clarify the issue of injury AOE/COE. As noted above, a reporting physician's report must comply with the substantial evidence requirements delineated in *Hegglin v. Workmen's Comp. Appeals Bd*., *supra*; *Granado v. Workmen's Comp. Appeals Bd. supra*; and *Escobedo v. Marshalls, supra.* Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (see *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, having done a detailed review of the trial record, including the reports discussed herein, under the circumstances of this matter, it appears that it may be in the parties' interest to have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Orders issued by the WCJ on January 12, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 12, 2021 Findings of Fact and Orders is **RESCINDED**, and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 5, 2021

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

FERNANDO FELIX
GATEWAY PACIFIC LAW
LENHAN SLATER