

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

GABRIEL LEON, *Applicant*

vs.

**TREE OF LIFE RETIREMENT HOME;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ12387385, ADJ12387394
Santa Barbara Satellite Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.¹ We now issue our Opinion and Decision after Reconsideration.

Defendant State Compensation Insurance Fund (SCIF) seeks reconsideration of the Joint Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on January 14, 2020, in case number ADJ12387385.²

The WCJ found that applicant was employed on January 17, 2019; that further development of the record is necessary to support a finding of injury; and that defendant failed to meet their burden with respect to a post-termination defense.

Defendant contends that applicant did not meet his burden of proof that he sustained an injury on January 17, 2019, in case number ADJ12387385, and that the WCJ should have ordered that applicant take nothing.

We have not received an answer.

¹ Commissioner Dodd, who previously served as a panelist in this matter is unavailable to participate further. Another panel member was assigned in her place.

² Case number ADJ12387385 and case number ADJ12387394 were consolidated for trial and the WCJ issued a joint F&O. In case number ADJ12387394, the cumulative trauma case, the WCJ found no injury and ordered that applicant take nothing. Because no party challenges the findings in case number ADJ12387394, we will not address it herein and do not disturb the WCJ's findings in case number ADJ12387394.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, for the reasons stated in the WCJ's report, and as discussed herein, as our decision after reconsideration, we will affirm the F&O.

BACKGROUND

On July 22, 2019, applicant filed an application for adjudication, claiming injury to various body parts on January 17, 2019, while employed by defendant as a caregiver (case number ADJ12387385). On July 22, 2019, applicant also filed a concurrent application for adjudication claiming cumulative injury to his psyche and nervous system while employed by defendant as a caregiver, during the period from February 1, 2015 to January 27, 2019 (case number ADJ12387394).

On October 18, 2019, defendant filed a declaration of readiness to proceed (DOR) on the issue of AOE/COE, as follows: "A trial is necessary to address AOE/COE." (Defendant's DOR, dated October 18, 2019, p. 2.)

On November 1, 2019, applicant filed an objection to defendant's DOR, stating in part as follows:

Discovery is still ongoing and has not concluded. Applicant was scheduled to see dental PQME, Dr. Solanki on November 18, 2019. On October 18, 2019, Defendant objected to the appointment until the threshold issue injury AOE/COE has been resolved. To this date there is no Med Legal evaluation addressing causation, additional discovery is required to develop the record.

(Applicant's objection to DOR, November 1, 2019, p. 1.)

On November 4, 2019, a conference was held and the minute order from the hearing states:

11/18/19 PQME appt w/ dentist QME is stayed pending determination of employment and AOE/COE issues.

(minutes from November 4, 2019, hearing, p. 1.)

The matter proceeded to trial on December 17, 2019. With respect to the specific injury claim, the issues presented at trial were as follows: employment; AOE/COE; and defendant's assertion of the post-termination defense. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 17, 2019, p. 2.) At trial, applicant testified that he received treatment for his injuries, including surgery for his teeth. (MOH/SOE, December 17, 2019, p. 7.)

In the Petition, defendant contends that applicant should not be allowed to obtain a medical report post-trial to determine AOE/COE and that applicant should take nothing. Defendant does not challenge the finding of employment or that defendant failed to meet their burden with respect to a post-termination defense.³

DISCUSSION

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, § 5904.⁴) 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 includes findings on threshold issues, including the finding of employment, the finding that defendant failed to meet their burden with respect to a post-

³ Accordingly, the findings regarding employment and post-termination defense are not addressed herein.

⁴ All future statutory references are to the Labor Code, unless otherwise specified.

termination defense, and the finding of no injury in the cumulative trauma case. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. While these are threshold issues, they were not challenged on reconsideration and we will not disturb the WCJ's findings.

Turning to defendant's Petition, defendant asks that we find that, because of the lack of medical evidence, applicant did not meet his burden of proof that he sustained injury AOE/COE. The WCJ determined that that the medical record needs to be developed by use of a PQME, AME or "regular physician" appointed by the WCJ, in order to prove or disprove a contested injury. (Report, p. 3.) The WCJ's finding that additional medical evidence is necessary to develop the record is not a threshold issue. Although the decision contains a finding that is final, the 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Here, the WCJ determined that there is insufficient medical evidence upon which the threshold issue of injury AOE/COE may be determined. Where there is insufficient evidence on a threshold issue, the WCJ has a duty to further develop the record. (Lab. Code, §§ 5701, 5906; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) The WCJ has the authority to order additional medical evidence when required for substantial evidence. (Lab. Code, §§ 5701, 5906; *Old Republic Ins. Co. v. Workers' Comp. Appeals Bd.* (2020) 85 Cal.Comp.Cases 504, 508 (writ den.); *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McDuffie v. Los Angeles*

County Metropolitan Transit Authority (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc); see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

It is well established that a WCJ's opinions regarding witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358]; *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793 [59 Cal.Comp.Cases 324]; *Greenberg v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 792 [39 Cal.Comp.Cases 242].) Based upon our review, we see no reason to question the WCJ's opinions as to the credibility of applicant and defense witnesses.

Defendant contends that applicant failed to exercise due diligence with respect to presenting medical evidence and, as such, the record should not remain open. (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].) Defendant's reliance on *Telles* is misplaced. Here, it appears that applicant requested a QME panel to develop medical evidence and scheduled an appointment for applicant with panel QME Dr. Vivik Solanki. However, defendant objected to the appointment. In contrast to *Telles*, the record here suggests that applicant's counsel attempted to obtain substantial evidence to support applicant's claim.

Here, the WCJ requires additional medical evidence in order to make a decision regarding injury AOE/COE. Defendant has not met their burden of showing that further development of the record will result in significant prejudice or irreparable harm if removal is denied and/or that reconsideration will not be an adequate remedy. Therefore, we will deny the Petition as one seeking reconsideration. Based on the record before us, we do not disturb the WCJ's findings.

Accordingly, as our decision after reconsideration, we affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 14, 2020 Joint Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 20, 2021

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

**GABRIEL LEON
GHITTERMAN GHITTERMAN & FELD
SOLIMON RODGERS
STATE COMPENSATION INSURANCE FUND**

JB/abs

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