WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAMIRO LUNA, *Applicant*

vs.

WEST VALLEY CONSTRUCTION; OLD REPUBLIC GENERAL INSURANCE CORPORATION, administered by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Number: ADJ10575813
Oxnard District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and/or Removal 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 in the WCJ's report, which we adopt and incorporate except as noted below, and for the reasons stated below, we will deny reconsideration.

We do not adopt and incorporate the WCJ's recommendation that we dismiss reconsideration. Rather, we will treat defendant's petition as one seeking 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, 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 includes a finding regarding the threshold issue of jurisdiction in Findings of Fact number 1. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Moreover, although petitioner does not explicitly challenge Finding of Fact number 1, we are persuaded that defendant is in fact challenging the WCAB's jurisdiction to consider applicant's Petition for Reopen. In its petition, defendant asserts "because there was no original injury, there are no grounds to file a Petition to Reopen for New and Further injury." (Petition for Reconsideration, at p. 5:12-13.) We interpret this assertion as a challenge of the Appeals Board's jurisdiction. However, for the reasons stated in the Report, we agree with the WCJ that the June 4, 2019 Findings and Award found injury arising out of and occurring in the course of employment (AOE/COE) in the form of dehydration and, because there was a finding of industrial injury, the WCJ had jurisdiction to consider applicant's Petition to Reopen.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 13, 2022

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

RAMIRO LUNA
LEVITON, DIAZ & GINOCCHIO, INC.
KARLIN, HIURA & LASOTA, LLP
GHITTERMAN, GHITTERMAN & FELD

PAG/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Defendants WEST VALLEY CONSTRUCTION and OLD REPUBLIC GENERAL INSURANCE CORPORATION (ORGIC,) by and through their attorneys of record, have filed a timely Petition for Reconsideration and/or Removal challenging the Findings and Order of 23 February 2022 ordering the parties to conduct discovery on applicant's Petition to Reopen. In it Petitioner argues that the undersigned erred in finding Judge Mays' prior Findings & Award to be a finding of injury. Specifically, they argue that Judge Mays' Award granting medical treatment costs to the applicant does not constitute a finding of injury but only a finding of a "dehydration incident." They also argue that the finding was a final order where reconsideration was denied so that Judge Mays' Findings and Award is protected by the doctrine of Res Judicata. Consequently, they argue that the undersigned erred in finding that the applicant may reopen the case to assert further disability and additional parts of body. Additionally, defendant also argues that insufficient evidence exists to support a Petition to Reopen.

To date, no answer to the Petition has been received.

It is recommended that reconsideration be dismissed and that removal be denied.

II FACTS

Applicant, RAMIRO LUNA, aged 60 on the date of injury while employed by WEST VALLEY CONSTRUCTION, insured by OLD REPUBLIC GENERAL INSURANCE CORPORATION (ORGIC,) administered by GALLAGHER BASSETT SERVICES, claims to have sustained injury arising out of and in the course of employment on 17 August 2016.

This case began as a medical-only claim where applicant became dehydrated while doing construction work outdoors in the hot sun. He was transported by ambulance to San Joaquin Valley Community Hospital where he complained of chest pains, among symptoms. The hospital conducted tests to diagnose his condition and concluded that he was suffering from dehydration and not from heart disease. He was treated and released.

Applicant, through counsel, then filed an Application for adjudication on 13 September 2016 alleging injury to the circulatory system, upper extremities, shoulder and chest. On 17 October 2016, having hired new counsel, applicant clarified that he was claiming injury to his left arm and left shoulder and added the heart as a part of body claimed to be injured.

The parties then proceeded to use the panel – qualified medical evaluation (PQME) process to select PQME's in orthopedic surgery (See Exhibit "F") and Internal Medicine (Exhibits "G," "H" and "I.") The Orthopedic PQME, Dr. Theodore Georgis, found "no evidence of residuals of an

industrial injury involving his upper extremities." Dr. Grodan, the internal medicine doctor, specializing in cardiovascular ailments, found no evidence of a heart condition and concluded that applicant had suffered an incident involving dehydration, was entitled to no more than two days of temporary total disability and while he did have a heart condition and hypertension, the former was not clinically significant and the latter was not industrial.

The case proceeded to trial in front of Judge Mays of the Oxnard Board on 15 May 2019. Judge Mays then issued a decision on 04 June 2019. The decision was entitled "Findings and Award" and found that applicant suffered dehydration as a result of working on 17 August 2016. However, he also found that no body parts were injured. Additionally, he found no permanent disability or further medical care were warranted. In his Opinion on Decision, Judge Mays stated:

> ". . . it is found that applicant did not sustain injury to his bilateral upper extremities, heart, chest, circulatory system, bilateral shoulders, or hypertension as a result of heat stroke or dehydration arising out of and occurring in the course of employment on 8/17/2016. [¶] The applicant did suffer dehydration as a result of work on 8/17/2016, causing his need to be taken to the San Joaquin Community Hospital E.R. Once hydrated, he was released shortly thereafter. He did not injure any alleged body part, nor any body part as a result of his dehydration on 8/17/2016."

However, in the Findings and Award, he did award costs, presumably medical treatment costs, "associated with the dehydration incident on 8/17/2016 and the applicant's visit to the San Joaquin Community Hospital Emergency Department on 8/17/2016."

On 27 June 2019, applicant filed a largely handwritten Petition for Reconsideration arguing that the PQME's do not live in Bakersfield and do not understand the long-term consequences of heat stroke and that he suffered a long year of such consequences after the incident of 17 August 2016. Applicant sought to be seen by a heat stroke specialist. Judge Mays filed a Report and Recommendation and the Appeals Board adopted and incorporated this Report and Recommendation.

On 10 August 2021, applicant, through counsel, filed a Petition to Reopen. Since then, at both a conference and trial of this matter, the applicant's attorney argued that he is entitled to a re-examination by the two PQME's while the defendant argues that Judge Mays' decision was a finding of no injury.

Judge Mays has since retired and so was not available to resubmit this case. Thus, the undersigned is tasked with interpreting the decision and to determine whether the decision finds that an industrial injury occurred.

III
DISCUSSION

Defendant argues that the doctrine of res judicata prevents the relitigation of matters contained in the first judgment. However, the undersigned does not believe that the doctrine of res judicata is

involved in this case. In fact, the undersigned would agree that Judge Mays' decision is final. It was tried to conclusion and affirmed by the Appeals Board after the injured worker filed a Petition for Reconsideration. There was no Petition for Writ of Review so that the decision is final.

That said, the question in this case is not whether the doctrine of res judicata applies but whether the applicant can file a Petition to Reopen pursuant to either Labor Code § 5410 or Labor Code § 5803-5804. In other words, the question is not whether the decision is final, but whether the decision finds that an injury occurred.

Applicant has filed a Petition to Reopen seeking to add parts of body and additional benefits over and above the medical care costs granted to him in the Award. The problem is that the prior decision is ambiguous.

In the prior Findings and Award, the prior judge in Finding number 5 finds that "no body parts were injured." As pointed out in defendant's Petition for Reconsideration, Judge Mays describes the 17 August 2016 event where he was taken by ambulance to San Joaquin Hospital as either an "incident" or "dehydration." Also as argued by the defense, the prior judge specifically finds that the applicant did not suffer an injury to any of the claimed parts of body, including the bilateral upper extremities, the heart, the chest, the circulatory system, bilateral shoulders or hypertension.

Judge Mays' decision was based on the opinion of the Qualified Medical Evaluators (QME) Drs. Georgis and Grodan. Dr. Grodan is quite clear that the dehydration incident was industrial. He does not call it an "injury" but that is clearly what it is. An injury is an incident that causes the need for medical care or causes lost time from work. See Labor Code § 3208.1. In this case, the applicant was taken to an emergency room, was rehydrated and lost time from work. The internal PQME states that applicant probably lost two days of temporary total disability. Since this is less than the 3-day minimum, he receives nothing but he did lose time from work.

The fact that Judge Mays calls this an incident and not an injury does not change the fact that he awarded the treatment and describes the incident as industrial.

Additionally, Labor Code § 3202 mandates that legal questions involving Division 4 and 5 of the Labor Code, shall be resolved in favor of furnishing benefits to injured workers. Thus, there are social policy reasons for interpreting this Award as an award of benefits.

Having established an injury is found or implied to be found in the Award, the next step is to determine whether the applicant may pursue a Petition to Reopen. Here, there are two statutes that provide for such a Petition: either Labor Code § 5410 or Labor Code § 5803. Either of these Labor Code sections may apply in this case but the key is whether the applicant filed a Petition to Reopen within five years of the date of injury. Here the applicant's injury occurred on 17 August 2016 and he filed his Petition on 10 August 2021. Thus, the Petition to Reopen is timely.

At this point, the key issue in this case becomes important. Does the applicant, who has been denied further medical treatment, have the right to go back to the PQME's in this case to determine whether his condition has worsened?

In Hunter vs. Ryerson (BPD 2018) 46 CWCR 31 a Board panel ordered development of the record by returning to the Agreed Medical Evaluator (AME) in the case. Defendant there, as here, had filed a Petition for Reconsideration or Removal seeking to have the Board send the case back for trial before going back to the AME. The Appeals Board instead distinguished 8 CCR Rules 10455 and 10458 (now Rules 10534 and 10536 and concluded that once a petition to reopen is filed, it preserves jurisdiction to conduct discovery.

See also, Dixon vs. G2 Secure Staff (2015) 2015 Cal Wrk Comp PD LEXIS 747; and Cassidy vs. Endel Design (2011) 2011 Cal Wrk Comp PD LEXIS 468 (Both are LEXIS Noteworthy Panel Decisions.)

Also, under Labor Code § 5803, there is support for the idea that a judge may use a Petition to Reopen to correct a mistake or inadvertence. See Alamo Packing vs. WCAB (Leyva) (w/d 1995) 60 CCC 607 (adding a body part omitted in the prior award) and Alaino vs. WCAB (1979) 100 Cal.Ap 3d 341; 44 CCC 1156, 1170 – 1175 (correcting the permanent disability.) These facts would seem to qualify since the prior judge appears to have used the word "incident" instead of "injury." Here, the prior decision was affirmed on a Petition for Reconsideration so that the Appeals Board would have the power to amend it.

Since it would appear that authority exists for the decision to be interpreted as one finding injury and for sending the applicant back to the PQME, the question then becomes whether the defendant's Petition is one for reconsideration or for removal. In deciding this, one would consider whether the decision to allow discovery on a Petition to Reopen is a final order or an interlocutory order. Here, the undersigned did not enter a new judgment but simply interpreted the old one to mean that applicant was entitled to go back to the PQME to determine if his condition has worsened. Here, since the undersigned does not enter a new judgment, the Findings and Order of 23 February 2022 was an interlocutory discovery order. Thus, reconsideration of this case is premature and should be dismissed.

That leave the issue of removal. The next question becomes, whether the defendant would suffer substantial prejudice or irreparable harm by this order. The undersigned does not believe substantial prejudice or irreparable harm will occur. The undersigned anticipates a supplemental report of one or both of the PQME's and perhaps a deposition. After that, in the event that one or both of these doctors does find new and further disability, a trial may occur. Defendant has a remedy and no irreparable harm is shown.

IV
RECOMMENDATION

To the extent that this Petition is one for Reconsideration, it is recommended that the Petition for Reconsideration be dismissed as premature. To the extent that the Petition is one for Removal it is also recommended that the Petition be denied as there is an adequate remedy: Discovery and trial.

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers' Compensation Judge