

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

ANNETTE MCDONNELL, *Applicant*

vs.

**PARADISE RIDGE WINERY; OAK RIVER INSURANCE, administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Numbers: ADJ15391752; ADJ11796055
Santa Rosa 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 presiding workers' compensation administrative law judge (PWCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the PWCJ's report, which we adopt and incorporate, we will deny reconsideration.

A petition for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order "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]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661].) If a decision includes resolution of a "threshold" issue, then it may also be a "final" decision whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650]; *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc); see *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary orders entered in the midst of workers' compensation proceedings are not considered "final" orders because they do not determine substantive rights or liabilities. (*Maranian, supra*, 81 Cal.App.4th

at p. 1075; *Rymer, supra*, 211 Cal.App.3d at p. 1180; *Kramer, supra*, 82 Cal.App.3d at p. 45; see *Gaona, supra*, 5 Cal.App.5th at p. 660.) A decision may address a hybrid of both final and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision contains a final order. However, if the petitioner challenging the hybrid decision disputes only the PWCJ's determination of an interlocutory issue, then the Appeals Board will evaluate the issue raised by the petition under the removal standard applicable to interlocutory, i.e., non-final orders. (See Cal. Code Regs., tit. 8, § 10843.)

Here, the PWCJ's Joint Findings and Order (F&O) determines that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her left shoulder on June 13, 2018, and also from June 13, 2017 to November 12, 2021. (Finding of Fact No. 1.) The determination of injury AOE/COE is a threshold order, subject to reconsideration. (*Maranian, supra*, 81 Cal.App.4th at p. 1075.)

Additionally, the F&O determines that there is insufficient evidence to establish that the reporting of the QME violates section 4628. (Finding of Fact No. 4.) Pursuant to Labor Code section 4628(e), a judicial determination that a medical-legal report "[failed] to comply with the requirements of this section shall make the report inadmissible as evidence and shall eliminate any liability for payment of any medical-legal expense incurred in connection with the report." (Lab. Code, § 4628(e).) A judicial determination with respect to an alleged violation of section 4628 necessarily implicates the reporting physician's rights to reimbursement for the preparation of the report as well as the defendant's concomitant right to resist such reimbursement in collateral proceedings. Consequently, the WCJ's determination regarding section 4628 compliance is a final order.

We have therefore treated both the PWCJ's threshold findings of injury AOE/COE, as well as the PWCJ's determination regarding section 4628, as final orders subject to reconsideration. (*Gaona, supra*, 5 Cal.App.5th at p. 662.)

Defendant contends the PWCJ erred in determining that applicant sustained injury AOE/COE to the left shoulder in Case No. ADJ15391752 as a result of cumulative injury from June 13, 2017 to November 2, 2021.

The PWCJ's Report observes that the issue was previously addressed in Joint Findings and Order, issued on February 15, 2022. Therein, the PWCJ determined that applicant sustained injury AOE/COE to the left shoulder on June 13, 2018, and also from June 13, 2017 to November 2,

2021. (Joint Findings and Order, dated February 15, 2022, Finding of Fact No. 1.) The PWCJ's decision was not appealed by any party and is now final. We also observe that the parties stipulated during the January 10, 2022 trial proceedings that applicant sustained injury to the left shoulder from June 13, 2017 to November 2, 2021. (Minutes of Hearing (Expedited), dated January 10, 2022, at p. 2:8.) Accordingly, we discern no error in the PWCJ's November 27, 2023 determination that applicant sustained injury AOE/COE during the period June 13, 2017 to November 2, 2021. (Finding of Fact No. 1.)

Defendant further contends the PWCJ erred in finding that the QME reporting did not violate section 4628, because the statute requires the QME to review and summarize prior medical records. (Petition for Reconsideration (Petition), at p. 15:14.) However, subdivision (c) of section 4628 provides that "if the initial outline of a patient's history or excerpting of prior medical records is not done by the physician, the physician shall review the excerpts and the entire outline and shall make additional inquiries and examinations as are necessary and appropriate to identify and determine the relevant medical issues." (Lab. Code, § 4628(c).)

Here, as the PWCJ notes in her Report, the QME has identified the personnel who assisted with the outline of the patient's history and excerpting of the records and has further described the process by which the QME personally reviews these excerpts. (Report, at pp. 4-5; Ex. 6, Report of Donald Lee, M.D., dated June 23, 2023, at p. 1.) The QME testified to reviewing the excerpted records side by side on a "split screen" with the underlying medical records in order to "compare the two to make sure that the summary is done accurately." (Report, at p. 5; Ex. 8, Transcript of the Deposition of Donald Lee, M.D., dated June 22, 2023, at p. 15:2.) The QME further testified that he personally reviews the history with the patient as part of the examination to ensure the record review is accurate. (Report, at p. 5.) Finally, the QME verified that he personally makes all necessary changes to the medical history and record review prior to the issuance of the final report. (*Id.*)

Following our independent review of the record occasioned by defendant's Petition, we concur with the PWCJ that the QME has appropriately "review[ed] the excerpts and the entire outline and [has made] additional inquiries and examination as are necessary and appropriate to identify and determine the relevant medical issues." (Lab. Code, § 4628(c).) We will affirm the PWCJ's decision, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 12, 2024

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

**ANNETTE MCDONNELL
LAW OFFICES OF CHARLES DAVIS
MICHAEL SULLIVAN & ASSOCIATES**

SAR/abs

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

Defendant Paradise Ridge Winery, insured by Oak River Insurance and administered by Berkshire Hathaway Homestate Companies, through their attorney of record, Nancy Hill, filed a timely, verified Petition for Reconsideration challenging the Joint Findings and Order dated November 27, 2023.

Applicant sustained a specific industrial injury on or about June 13, 2018 (ADJ11796055) and a cumulative trauma from June 13, 2017 through November 12, 2021 (ADJ15391752) to her left shoulder during the course of her employment as a tasting room manager at Paradise Ridge Winery. The specific injury occurred when a large commercial umbrella opened in the wind while the applicant was lifting it to get it back into the base.

She was age 49 on the date of specific injury and age 52 at the time of the cumulative trauma.

This matter proceeded to trial on the issue of whether the Qualified Medical Evaluator (QME), Donald Lee, DO MPH, should be replaced due defendant's allegation that Dr. Lee violated Labor Code §4628.

In the Findings and Order dated November 27, 2023, it was found that there was insufficient evidence to establish that QME Dr. Lee violated Labor Code section §4628. Defendant's Petition to Strike Dr. Lee for Violation of Labor Code §4628 and Amended Petition to Strike Dr. Lee for Violation of Labor Code §4628 were denied.

Petitioner contends:

- a. Reconsideration must be granted because there was no basis for finding applicant sustained a cumulative trauma injury from June 13, 2017 through November 12, 2021 to her left shoulder. *Petition p. 9, line 15, p. 11, line 10.*
- b. Reconsideration must be granted because the Judge erred in concluding Dr. Lee did not violate Labor Code §4628. *Petition, p. 11, line 11-p. 20, line 7.*

II

FACTS

Applicant sustained a specific industrial injury on or about June 13, 2018 (ADJ21796055) and a cumulative trauma from June 13, 2017 through November 12, 2021 (ADJ15391752) to her left shoulder during the course of her employment as a tasting room manager at Paradise Ridge Winery. The specific injury occurred when a large commercial umbrella opened in the wind while the applicant was lifting it to get it back into the base.

The parties duly selected Donald Lee, as the Qualified Medical Evaluator. Over the course of his two-year involvement in this matter, Dr. Lee has issued two evaluating reports, four supplemental reports, and availed himself to six depositions (only two transcripts were offered into evidence as relevant here).

An earlier Expedited Hearing was held on January 10, 2022 on the sole issue of defendant's request for a new QME panel based on bias. At the Expedited Hearing, the parties stipulated that the applicant sustained a specific injury on June 13, 2018 (ADJ11796055) and a cumulative trauma during the period from June 13, 2017 through November 2, 2021 (ADJ15391752). (EAMS Doc. No. 77487736.)

In a Joint Findings and Order of January 21, 2022, the undersigned WCJ found that the reports of Dr. Lee constitute substantial medical evidence and there is no evidence of bias within Dr. Lee's reporting. (EAMS Doc. No. 75184672.) It was ordered that QME Dr. Lee remain as the parties' Qualified Medical Evaluator and the defendant's request for a replacement QME panel or a regular physician pursuant to Labor Code §5701 were denied.

Dr. Lee issued a supplemental report on October 3, 2022, stating

"I conducted every part of the evaluation personally, including taking a complete history, reviewing, and summarizing the medical records, and compositing and drafting the conclusions of the report. Office assistant Manjula Koniki excerpted the Review of Records. I reviewed the excerpts and then made additional inquiries and examinations as necessary and appropriate to identify and determine the relevant medical issues." (Jt. Exh. 5, Dr. Lee, 10/3/22.)

In his deposition of April 10, 2023, Dr. Lee testified as follows:

Q: And the way this works, just out of curiosity, do they basically take everything down and then you review the notes and type up the report yourself or do you just go through? How does that work?

A: Well, they review the notes and I basically go through the history with the patient.

Q: Okay. Because I know, like, this report and the first report were primarily- but they were only notes from the patient to start out with. So I think that's where the kind of the -for example, the temporary disability part we're talking about right now, I think that's why I'm wondering about that it, for example, she believed she was only off work for three months and then went back to work and worked full duty. That information would have been something the historian took for you; right?

A: No, that information, I did it myself.

Q: Okay.

A: Because what I always focus on is the previous complaint. I focus on the periods of the TTD and the type of treatment that they went through. For example, what medication they took and who is-what kind of family medical problem they have. If that doesn't pertain to the report, per se, then I will basically just kind of go through with the patient. But if they have something like a carpal tunnel, I would want to know whether they have. I will specifically whether they have problems, thyroid, whether it has anything to do with swelling during a pregnancy, diabetes, that type of condition. Because those-those are more in-depth than just asking, do you have any allergies or do you take medications. (Jt. Ex. J7, Dr. Lee, p. 93, line 23-p. 95, line 8.)

Following the deposition, the defendant requested various documents from Dr. Lee's Account Manager, Marily Villagomez, including the patient questionnaire, the names and notes of the "trained medical historian", the name and company information for the person who provided the record review and the actual record review relating to prior QME reports. (Def. Exh. D.) Later that day, Ms. Villagomez provided a 114-page response to defendant's request, including the identities of the medical record Summarizers (Sravanthi Gungi and Raghavender Apparasu). (Def Exh. E.)

Dr. Lee was deposed again on June 22, 2023. Dr. Lee testified as follows:

A: I look at the summary, and I'll look at the actual records, and I'll compare the two. So I have a split screen. I will compare the two to make sure that the summary is done accurately.

Q: So you actually will sit down and go over 1,000 pages of records yourself; is that correct?

A: That is correct.

Q: And what happens if you find a discrepancy?

A: Then I will --so all -as you can see, all my report has the records of what I have reviewed. So I will -I will -as I look at the summary, if I need to change any of it, so I'll physically, using my word processing on my desktop or laptop, and just edit it.

(Jt. Exh. 8, Dr. Lee deposition, 6/22/23, p. 15, lines 2-14.)

Dr. Lee testified that he changes the summary before he puts it in his report. (Jt. Exh. 8, Dr. Lee, 6/22/23, p. 16, lines 2-5.) Dr. Lee works with Premier Physician Management Corporation, on an administrative basis, (Jt. Exh. 8, Dr. Lee, 6/22/23, p. 6, lines 5-10; p. 8, lines 4-5.) Preferred Physicians will check for grammatic mistakes and, a lot of times, any changes that they make, they have to send it back to Dr. Lee for him to approve the changes and finalize the report. (Jt. Exh. 8, Dr. Lee deposition, 6/22/23, p. 16, lines 11-15 .) Dr. Lee takes the history when he sees the patient and reviews the history . with the patient, to make sure it is adequately taken. (Jt. Exh. 8, Dr. Lee deposition, 6/22/23, p. 17, lines 18-20.) Dr. Lee relies on his own review of the records. (Jt. Exh. 8, Dr. Lee deposition, 6/22/23, lines 10-12.)

The day after his deposition, Dr. Lee issued a supplemental report listing the names of the office assistants and medical historian involved in this matter. Dr, Lee stated:

“I conducted every part of the evaluation personally, including taking a complete history, reviewing and summarizing the medical records and composing and drafting the conclusions of the report. Office assistants Manjula Koniki, Arun Kumar Sriram, Raghavender, Apparasu, Sravanthi Gungi, Arun Kumar Sriram, and Ushapraveena Kamera excerpted the Review of Records. I reviewed the excerpts and then made additional inquiries and examinations as necessary and appropriate to identify and determine the relevant medical issues. Medical historian Daniela Ferrario obtained the initial outline of applicant’ Annette McDonnell’s history. I reviewed the entire outline and then made additional inquiries and examinations as necessary and appropriate to identity and determine the relevant medical issues.” (Jt. Exh. 6, Dr. Lee, 6/23/23.)

This matter proceeded to trial on October 9, 2023 on the sole issue of whether the QME reporting of Dr. Lee should be stricken pursuant to defendant’s Petition to Strike Dr. Lee for

Violation of Labor Code §4628 and Amended Petition to Strike Dr. Lee for Violation of Labor Code §4628. This matter was submitted without testimony.

The undersigned WCJ issued a Findings and Order stating that there was insufficient evidence to establish that QME Dr. Lee violated Labor Code section 4628 and that defendant's Petition to Strike Dr. Lee and Amended Petition to Strike Dr. Lee were denied.

It is from this Findings and Order that the petitioner seeks reconsideration.

III

DISCUSSION

A. THE CUMULATIVE TRAUMA FROM JUNE 13, 2017 THROUGH NOVEMBER 12, 2021 WAS PREVIOUSLY STIPULATED TO BY THE PARTIES AND FOUND BY THE COURT.

Petitioner takes issue with the court's finding of a Cumulative Trauma from June 13, 2017 through November 12, 2021. Specifically, the petitioner asserts that the court relied on the reporting of Dr. Lee to support this finding. (Petition p. 11, lines 1-2.) Petitioner states, "This is not a trivial finding. Defendant would be later barred from challenging this finding of fact if it is not timely appealed". (Petition, p. 11, lines 7-10.) However, this a misrepresentation of the record.

The finding of a Cumulative Trauma from June 13, 2017 through November 12, 2021 has long been final. The parties previously stipulated to this cumulative injury in a signed pre-trial conference statement on January 10, 2022. (EAMS Doc. No.77487736) The undersigned WCJ relied on these Stipulations, not Dr. Lee's reports as alleged by the petitioner, to find the CT from June 13, 2017 through November 12, 2021. No Reconsideration or Removal was filed, rendering that Finding and Order final as of February 15, 2022, almost two years ago.

To initiate this immediate proceeding, the petitioner filed the Declaration of Readiness to Proceed listing the case numbers for both the specific injury and cumulative trauma. (EAMS Doc. No. 47429436.) The Pre-Trial Conference Statement, signed by both the applicant's attorney and the petitioner, also included the case numbers for both injuries. (EAMS Doc. No. 4789575.) The two case numbers were listed on the petitioner's Petition to Strike Dr. Lee (EAMS Doc. No. 46329134), petitioner's Amended Petition to Strike Dr. Lee. (EAMS Doc. No. 47418688), and petitioner's Trial Exhibit List (EAMS Doc. No. 48235872.). Donald Lee, M.D. is the Qualified Medical Evaluator for both the specific injury and cumulative trauma.

For the court to simply ignore one of the cases explicitly listed by the parties would not only violate CCR section 1033 0 but may amount to a dereliction of her ethical duty to hear and decide all matters assigned to her. (Ca. Code Jud. Ethics, canon 3B(1).) Of course, a WCJ has full power to hear and determine all issues of fact and law presented and issue orders necessary to the full adjudication of the case. (CCR § 10330) In this matter, the cumulative trauma finding was merely reciting a legally binding Stipulation within a case the parties explicitly included for decision.

B. THERE IS INSUFFICIENT EVIDENCE TO SHOW THAT QME DR. LEE VIOLATED LABOR CODE SECTION 4628.

Labor Code section 4628(a) provides that,

“No person, other than the physician who signs the medical-legal report, except a nurse performing those functions routinely performed by a nurse, such as taking blood pressure, shall examine the injured employee or participate in the nonclerical preparation of the report, including all of the following: (1) Taking a complete history, (2) Reviewing and summarizing prior medical records, (3) Composing and drafting the conclusions of the report.”

(Labor Code §4628(a).)

Here, the Petitioner cites *Scheffield v. WCAB* (1999) 64 CCC 358 to support their position that the QME Dr. Lee’s reports should be stricken because he failed to comply with Labor Code section 4628(a) (Petition, p. 13, lines 3-8), In *Scheffield*, an x-ray technician was deemed within the purview of section 4628(b). The court held that “the taking of x-ray is a technical function, one which requires training, apprenticeship, and licensing, all regulated by the DBS and other government agencies. This is certainly more than a clerical or mechanical function ...” (*Id.*, at. p. 6.) “Persons performing diagnostic tests ... were to be accurately identified so that the litigants would know everyone involved in the evaluation process.” (*Id.*, at. p. 8.)

Scheffield differs from the facts here. There was no person, besides Dr. Lee, administering a diagnostic study on the applicant within the meaning of Labor Code §4628. The applicant completed her own medical history questionnaire prior to the QME evaluation. (Def. Exh. E.) Dr. Lee utilized named medical record “summarizers” and then subsequently reviewed the same records himself. As such, there is no opportunity for an ambiguous individual to skew the results of a diagnostic study, an outcome the *Scheffield* opinion aimed to prevent.

Conversely, the court in *City of Los Angeles, v. Workers Compensation Appeals (Webster)*(1998) 63 CCC 190 held that a medical legal report was not vitiated due to its use of information generated by a computer software program that scored and interpreted the applicant's MMPI test. The subsequent reporting of the source of information is sufficient to cure the technical defect. Additionally, the doctor's conclusions were based upon their own personal evaluations and opinions. "Once it has been disclosed that actuarial portions of the report were created by a computer program, and not by the reporting physician, the trier of fact is competent to evaluate the materiality of the report." *Id.* at 191.

WCAB Rule 10682(c) specifies that:

"All medical-legal reports shall comply with the provisions of Labor Code section 4628. Except as otherwise provided by the Labor Code and the Rules of Practice and Procedure of the Workers' Compensation Appeals Board, failure to comply with the requirements of this rule *will not make the report inadmissible but will be considered in weighing the evidence.*"

(Cal. Code Regs, tit. 8, §10682(c.) (emph. added.)

Pursuant to the court in *Webster*, supra, once disclosure has been made, the trier-of-fact evaluates the materiality of the reports. Here, there are insufficient grounds to strike Dr. Lee as the QME or render his reports inadmissible. (CCR §10682(c).) Dr. Lee's temporary lack of recall of the specific names of his medical assistants is not fatal and was cured by his credible deposition testimony and supplemental report. The record clearly shows that Dr. Lee reviewed the records himself and relied only on his review in formulating his opinions.

The Legislature enacted section 4628 as an anti-ghostwriting statute and to ensure the reliability of the medical evaluation by controlling the quality of the medical-legal report. (*Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.* (1996) 42 Cal. App. 4th 1260.) Here, this statutory intent is not thwarted by Dr. Lee's reporting.

IV.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: 12/28/2023

Respectfully submitted,

Katie F. Boriolo
Presiding Workers' Compensation
Administrative Law Judge