

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

ROBERT ADAMS, *Applicant*

vs.

**SAIA MOTOR FREIGHT LINE, LLC, permissibly self-insured,
administered by BROADSPIRE, *Defendants***

**Adjudication Number: ADJ10863682
Fresno District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

We have considered the allegations of applicant's Petition for Reconsideration/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 discussed below, we will grant the Petition as one seeking reconsideration, rescind the Findings of Fact, Order and Opinion on Decision (F&O) issued by the WCJ on December 21, 2020 and return this matter to the trial level for further proceedings consistent with this opinion.

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.)¹ Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

¹ All further statutory references are to the Labor Code unless otherwise stated.

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 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, applicant is only challenging the WCJ's finding that the reporting of the internal medicine agreed medical evaluator (AME) is not substantial evidence, the order striking the reports of the psychiatric qualified medical evaluator (QME) and order to develop the record with other evaluators. These are interlocutory decisions regarding evidence and discovery. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

The Appeals Board has the discretionary authority under section 5701 to develop the record when the medical record is not substantial evidence. (See Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Per *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 142 (Appeals Board en banc), the preferred procedure for developing a deficient record is to first allow supplementation of the medical record by the physicians who have already reported in the case. "If the use of physicians new to the case becomes necessary, the selection of an agreed medical evaluator (AME) by the parties should be considered at this stage in the proceedings." (*Id.*) The *McDuffie* decision concludes that "if none of the procedures outlined above is possible, the WCJ may resort to the appointment of a regular physician, as authorized by Labor Code section 5701." (*Id.* at pp. 142-143.)

The WCJ therefore acted within his discretion to order development of a record he found to be deficient. Pursuant to *McDuffie*, the preferred procedure if the previous physicians cannot supplement the record is for the parties to consider an AME. The F&O provided for the parties to consider AMEs in internal medicine and neuropsychology before appointment of regular physicians per section 5701. This is consistent with *McDuffie* and was within the WCJ's authority.

However, the current record does not reflect a basis to strike the psychiatric QME's reporting or not to provide his reports to other medical-legal evaluators in this matter. Statutory and case law favor the admissibility of medical reports provided they were obtained in accordance with the Labor Code. (See Lab. Code, §§ 4064(d), 5703(a), 5708; e.g., *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209].) Medical reports may be deemed inadmissible due to misconduct such as a party's ex parte communication with the medical-legal evaluator prior to issuance of the report (see e.g., *State Farm Ins. Co. v. Workers' Comp. Appeals Bd. (Pearson)* (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69] [the Court of Appeal found that the reports of an independent medical examiner should have been stricken because the applicant engaged in ex parte communication with the examiner prior to the evaluation]), or where a report is obtained from a private expert *solely* to rebut the opinion of the panel qualified medical evaluator (see e.g., *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256]).

Based on the current record, it was improper to strike the psychiatric QME's reports from the record. The Appeals Board finds no reason to disturb the other findings of facts and orders in the F&O.

Therefore, we will grant reconsideration, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Order and Opinion on Decision issued by the WCJ on December 21, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Order and Opinion on Decision issued by the WCJ on December 21, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 9, 2021

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

**BERRY SMITH & BARTEL
LAW OFFICE OF JEFF BANNER
ROBERT ADAMS**

AI/pc

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