WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ALVARO MUNOZ, *Applicant*

vs.

CASCADE DRILLING; ESIS;
ACE AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ13545767
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks removal in response to the Finding of Facts and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on December 6, 2021, wherein the WCJ ordered a replacement Qualified Medical Examiner (QME) panel in the Specialty of Pain Medicine.

Defendant contends that it suffered significant prejudice and irreparable harm due to the arbitrary and selective enforcement of AD Rule 31.5. (Cal. Code Regs., tit. 8, § 31.5.)

We have not received an answer.

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

We have considered the allegations in the Petition and the contents of the Report with respect thereto. Based on our review of the record, and as discussed herein, we will treat the Petition as one for reconsideration, grant reconsideration, and rescind the F&O.

BACKGROUND

Applicant claimed injury to various body parts, including his right wrist and right upper extremity, while employed by defendant as a driller helper on February 4, 2020.

On March 9, 2021, QME Stuart Rubin, MD, MPH served an initial report. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 2, 2021 trial, Exhibit AA - QME report by Dr. Stuart Rubin dated January 14, 2021 with Proof of Service dated March 9, 2021.)

On March 9, 2021, applicant objected to the late reporting of QME Dr. Rubin.[1] (MOH/SOE, December 2, 2021 trial, Exhibit CC - Applicant's objection letter to QME report, dated March 9, 2021.)

On March 11, 2021, applicant filed a request for a new QME panel. (MOH/SOE, December 2, 2021 trial, Exhibit BB - Replacement Panel Request by applicant dated March 16, 2021.)

On September 15, 2021, the matter was ordered taken off calendar without a hearing. The minutes state "UR approved a surgical consultation for applicant on 08/25/2021. The matter is not ripe for settlement." (Minutes, served September 17, 2021, p. 1.)

On September 17, 2021, defendant filed a declaration of readiness to proceed (DOR). The disputed issue was identified as: PQME STATUS. (DOR, September 17, 2021, p. 7.) The DOR also states in pertinent part:

> Applicant served 3/9/21 objection to untimely PQME Rubin report, dated 1/14/21 and served 3/9/21, and petitioned for replacement. Defendants contend applicant waived replacement due to untimely objection per reg 31.5.(a)(12). No action, to date, by medical unit on 3/16/21 petition. Issue raised and discussed, with no resolution, at 9/15/21 MSC but WCJ required new DOR. Board assistance is required.
> (DOR, September 17, 2021, p. 7.)

On December 2, 2021, the parties proceeded to trial. The disputed issue was identified as: whether applicant is entitled to a replacement QME panel per Rule 31.5(a)(12). (MOH/SOE, December 2, 2021 trial, p. 2.)

The WCJ adopted the parties' stipulations and made the following findings of fact:

1. The following stipulations of the parties are herein adopted as findings of fact:

[1] The record does not contain a proof of service for the letter objection so we cannot ascertain the date or method of service, but the parties stipulate that it was served on March 9, 2021, so we do not consider the issue of service.

a. Alvaro Munoz, born [], while employed on February 4, 2020 as driller helper at Sacramento, California by Cascade Drilling sustained injury arising out of and in the course of employment to the right wrist and claims to have sustained injury arising out of and in the course of employment to the right upper extremity.
b. At the time of the injury the employer's workers' compensation carrier was Ace American Insurance Company adjusted by ESIS.
c. No attorney fees have been paid and no attorney fee arrangements have been made.
d. There was a QME evaluation by Dr. Stuart Rubin on January 14, 2021. The initial QME report was served March 9, 2021. Applicant attorney objected to the QME report on March 9, 2021.

2. Applicant is entitled to a replacement panel.

(December 6, 2021 F&O, p. 1.)

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 (AOE/COE), 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].)

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]) 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].) The term 'final order' includes orders dismissing a party, rejecting an affirmative defense, granting commutation, terminating liability, and determining whether the employer has provided compensation coverage." (*Id.*, at p. 1075.) 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 orders. Here, the F&O included a finding that applicant sustained injury AOE/COE to the right wrist. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Although the F&O contains a finding that is final, defendant only challenges the WCJ's finding that applicant is entitled to a replacement QME panel. This is an interlocutory decision and is subject to the removal standard rather than reconsideration pursuant to the discussion above. (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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez, supra*; *Kleemann, supra*.) Additionally, 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).)

The issue in the instant matter is whether Labor Code section 4062.5[2] precludes the application of Rule 31.5(a)(12) or whether the Labor Code and Administrative Director's Rules can be harmonized, as applied to the facts before us. A general principle of statutory construction is that courts do not place form over substance where doing so defeats the objective of a statute. (*Pulaski v. American Trucking Associations, Inc*. (1999) 75 Cal.App.4th 1315, 1328 [64 Cal.Comp.Cases 1231, 1236].) Here, we believe that section 4062.5 and Rule 31.5(a)(12) can be harmonized to effectuate the Legistlature's intent.

The fundamental rule of statutory construction is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286].) In most instances this can be done by looking at the plain meaning of a statute because the words of the statute, "generally provide the most reliable indicator of legislative intent." (*Smith v. Workers'*

[2] All future statutory references are to the Labor Code unless otherwise specified.

Comp. Appeals Bd. (2009) 46 Cal.4th 272, 277 [74 Cal. Comp. Cases 575].) The words of the statute must be construed in context and "'statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.'" (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1], quoting *Walnut Creek Manor v. Fair Employment & Housing Com*. (1991) 54 Cal. 3d 245, 268; see also *DuBois*, *supra*, at p. 388.)

Pursuant to Labor Code section 4062.5, if a panel QME fails to complete the formal medical evaluation within the time frames established by the administrative director pursuant to paragraph (1) of subdivision (j) of section 139.2, a new evaluation may be obtained upon the request of either party, as provided in sections 4062.1 or 4062.2. Section 4062.1 outlines the procedure for requesting a medical evaluation where the employee is unrepresented by an attorney. (Lab. Code, § Section 4062.1.) Relevant here, section 4062.2 outlines the procedure for requesting a medical evaluation if the employee is represented by an attorney. (Lab. Code, § 4062.2.)

Pursuant to Labor Code section 139.2(j)(1)(A), the timeframe for initial medical evaluations to be prepared and submitted shall be no more than 30 days after the evaluator has seen the employee or otherwise commenced the medical evaluation procedure. (Lab. Code, § 139.2(j)(1)(A).) Consistent with section 139.2(j)(1)(A), Rule 38 provides the QME with 30 days to issue an initial comprehensive medical-legal evaluation report. (Cal. Code Regs., tit. 8, § 38(a)-(b).)

If the QME fails to timely issue a formal medical evaluation under Rule 38, a party may request a replacement QME pursuant to Rule 31.5. Specifically, Rule 31.5(a)(12) provides that a replacement QME panel may be requested if the medical evaluator failed to meet the deadlines specified in section 4062.5 and Rule 38 and the party requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report. (Cal. Code Regs., tit. 8, § 31.5(a)(12) (emphasis added).)

Previous panel decisions[3] have held that a party may not wait until after an adverse report issues to raise an irregularity but must do so at the earliest opportunity. (*Turner v. PT Gaming,*

[3] Appeals Board panel decisions, unlike en banc decisions, are not binding on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citeable authority and may be considered to the extent their reasoning is persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242 fn. 7 (Appeals Bd. en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

LLC (2018) 83 Cal. Comp. Cases 1337, 1342; *Fajardo v. Workers' Comp. Appeals Bd*. (2007) 72 Cal.Comp.Cases 1158 (writ den.).)

In *Fajardo v. Workers' Comp. Appeals Bd*. (2007) 72 Cal.Comp.Cases 1158 (writ den.), an Appeals Board panel adopted and incorporated a WCJ's report which held that a party may only object to the untimeliness of a report prior to the receipt of the report. The WCJ in *Fajardo* stated that "To allow the parties to review an unfavorable report and object for the sole reason of untimely service would wreak havoc in the system and would summarily endorse doctor shopping." (*Fajardo*, *supra*, at p. 1160.)

In *County of Sonoma v. Workers' Comp. Appeals Bd. (Smith)* (2008) 73 Cal.Comp.Cases 268 (writ den.), an Appeals Board panel affirmed the WCJ's denial of a new QME panel due to the untimeliness of a QME's initial report. The WCJ in *Smith* noted that Labor Code section 4062.5 was "designed to promote expeditious litigation so that injured workers may receive workers' compensation benefits to which they are entitled in a timely manner," and that ordering a new panel after the QME had served his report would be contrary to that goal. (*Smith*, *supra*, at p. 270.)

The holdings in *Fajardo* and *Smith* are consistent with Rule 31.5(a)(12), effective February 17, 2009, which states that a replacement QME panel will be provided whenever "The evaluator failed to meet the deadlines specified in Labor Code section 4062.5 and [Rule] 38 [] and the party requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report." (Cal. Code Regs. tit. 8, § 31.5(a)(12).)

The Merriam-Webster online dictionary defines "prior" as existing earlier in time : previous. (Merriam-Webster Online Dict. <https://www.merriam-webster.com/dictionary/prior> [as of February 15, 2022].) It is well established that a party must object to an untimely QME report under section 4062.5 and Rule 38 prior to the service of the report. (See *Fajardo, supra* [WCJ properly denied request for replacement QME panel when applicant waited until after receipt of report to object to its timeliness].) Here, applicant failed to object to Dr. Rubin's report prior to the date it was served upon the parties.

Accordingly, we treat the petition as one for reconsideration, grant reconsideration, and rescind the F&O.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the December 6, 2021 Finding of Facts and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 6, 2021 Finding of Facts and Order is **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 18, 2022

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

ALVARO MUNOZ
VELILLA LAW FIRM
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

JB/abs

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