WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICK HANSON, *Applicant*

vs.

COUNTY OF FRESNO, PERMISSIBLY SELF-INSURED; ADMINISTERED BY ACCLAMANTION INSURANCE MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ14125839
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration or removal of the April 25, 2022 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant was not entitled to a replacement panel of Qualified Medical Evaluators (QMEs). Applicant sought a replacement panel under Administrative Director (AD) Rule 31.5(a)(2), averring the selected QME could not set an appointment within 60 days. The WCJ determined that AD Rule 46.2, enacted as an emergency regulation during the COVID public health emergency, extended the time in which a QME could set an evaluation appointment to 90 or 120-days. The WCJ denied applicant's petition, accordingly. (Cal. Code Regs., tit. 8, § 46.2.)

Applicant contends that because AD Rule 46.2 does not extend the time limitations of 60 or 90-days set forth in AD Rule 31.5(a)(2), the WCJ erred in denying applicant's petition.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration or in the Alternative Removal, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will treat the petition as a hybrid petition seeking reconsideration, and deny the petition under the removal standard.

FACTS

Applicant claimed injury to skin, hearing, shoulders, right wrist, hands, low back, right hip, knees, right ankle, acid reflux, coronary artery disease, arrhythmia, and left ventricular hypertrophy, while employed as a deputy sheriff by County of Fresno (defendant) from June 1, 1996 to December 20, 2020.

On February 3, 2021, the DWC Medical Unit issued a panel of QMEs in orthopedic medicine. (Ex. 1.) On February 4, 2021, applicant petitioned the DWC Medical Unit for a replacement panel of QMEs under AD Rule 31.5(a)(2), averring the duly selected QME, Donald R. Schengel, M.D., was not available to evaluate applicant within 60 days of the appointment request. (Ex. 2.)

On February 16, 2021, the DWC Medical Unit denied applicant's petition, stating:

> Your request for a panel is being rejected. Based on title 8 California Code of Regulations section 46.2, which became effective May 14, 2020, regulation 31.3(e) has been suspended during the time period that regulation 46.2 is in effect. Regulation 46.2 provides in relevant part: "If a party with the legal right to schedule an appointment with a QME is unable to obtain an appointment with a selected QME within 90 days of the date of the appointment request, that party may waive the right to a replacement QME in order to accept an appointment that is no more than 120 days after the date of the party's initial appointment request." Your request does not show that the physician was unavailable to set an appointment within the timeframes of regulation 46.2, therefore a replacement will not issue.

The parties brought the matter to trial on April 22, 2022, and stipulated to the following:

> On ADJ14125839, the parties agree that, based upon the provisions of 8 CCR 42.6(b)(1), 8 CCR 31.3(e) is suspended, but Applicant claims that 8 CCR 31.5(a)(2) is not suspended, and as such Applicant, having the legal right to schedule a QME appointment, may request a replacement panel if the selected doctor cannot schedule the exam within 60 days of the scheduling call. (April 22, 2022 Minutes of Hearing (Minutes), at 2:12.)

The sole issue submitted for decision was "whether the medical unit should be ordered to issue a replacement panel per Applicant's petition of 2/20/21 as discussed." (Minutes, at 2:17.)

On April 25, 2022, the WCJ issued the F&O, determining that "applicant is not entitled to a replacement panel." (F&O, p. 2.) In the accompanying opinion, the WCJ observed:

> While section 31.5(a)(2) has not been suspended, the language therein is almost identical to the language on 31.3(e) which has been suspended. The undersigned thus finds that while 3l.5(a)(2) and 31.3(e) are obviously two distinctly numbered sections and bear two different titles for the sections, to the extent that the almost identical language of the language is contained in both sections and the language in question has been suspended by section 46.2(b)(l), the provisions of this section also apply to 31.5(a)(2). To hold otherwise would render COVID Emergency Regulation section 46.2(b)(l) completly [sic] inoperative. Such could not possible [sic] have been the regulatory intent. (F&O, Opinion on Decision, p. 4.)

Applicant's Petition responds that the language of Rule 31.5 is clear and sets forth time limitations of 60 days, limitations that were not changed by COVID-related emergency regulations. (Petition, at pp. 6-7.) Applicant further contends that if there is conflict between Rule 31.5 and 46.2, "the only way to harmonize these sections is to find the party with the legal right to set the evaluation has the sole discretion on whether to request a replacement panel or waive the 60 day scheduling limit up to 120 days." (*Id*. at p. 7.)

Defendant's answer observes that although Rule 46.2 does not explicitly state Rule 31.5 is superseded, Rule 31.5 is the remedy for a violation of Rule 31.3. (Answer, at 6:6.) As a result, Rule 31.5 is only operative if the time frames set forth in Rule 31.3 or emergency Rule 46.2 are exceeded. (*Id*. at 6:15.)

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.) 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 a threshold issue of employment. The WCJ's decision includes a determination that applicant was employed by defendant. 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 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, § 10955(a); 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, § 10955(a).) Here, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

AD Rule 31.3(e) provides:

> (e) If a party with the legal right to schedule an appointment with a QME is unable to obtain an appointment with a selected QME within sixty (60) days of the date of the appointment request, that party may waive the right to a replacement in order to accept an appointment no more than ninety (90) days after the date of the party's initial appointment request. When the selected QME is unable to schedule the evaluation within ninety (90) days of the date of that party's initial appointment request, either party may report the unavailability of the QME and the Medical Director shall issue a replacement pursuant to section 31.5 of Title 8 of the California Code of Regulations upon request, unless both parties agree in writing to waive the ninety (90) day time limit for scheduling the initial evaluation.

AD Rule 31.5 provides:

> (a) A replacement QME to a panel, or at the discretion of the Medical Director a replacement of an entire panel of QMEs, shall be selected at random by the Medical Director and provided upon request whenever any of the following occurs:
> …
> (2) A QME on the panel issued cannot schedule an examination for the employee within sixty (60) days of the initial request for an appointment, or if the 60 day scheduling limit has been waived pursuant to section 31.3(e) of Title 8 of the California Code of Regulations, the QME cannot schedule the examination within ninety (90) days of the date of the initial request for an appointment.

However, Emergency Rule 46.2, enacted May 14, 2020 in response to the COVID public health emergency, provides in pertinent part:

> (b) During the time this regulation is in effect,[1] section 31.3 (e) of title 8 of the California Code of Regulations, is suspended and the following is effective:
>
> (1) If a party with the legal right to schedule an appointment with a QME is unable to obtain an appointment with a selected QME within 90 days of the date of the appointment request, that party may waive the right to a replacement QME in order to accept an appointment that is no more than 120 days after the date of the party's initial appointment request. When the selected QME is unable to schedule the evaluation within 120 days of the date of that party's initial appointment request, either party may report the unavailability of the QME and the Medical Director shall issue a replacement pursuant to section 31.5 of title 8 of the California Code of Regulations upon request, unless both parties agree in writing to waive the 120-day time limit for scheduling the initial evaluation.

Applicant contends that AD Rules 31.5 operates independently of AD Rule 31.3, and that the changes made by emergency Rule 46.2 did not alter the time limitations in Rule 31.5. Thus, applicant asserts the right to replace a QME who is unavailable within the 60 days described in Rule 31.5 (absent agreement of the parties to extend the time limitation).

We decline, however, to read the regulation in isolation as urged by applicant. ""When construing a statute, we must 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 [90 Cal. Rptr. 2d 260, 987 P.2d 727], quoting *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [20 Cal. Rptr. 2d 523, 853 P.2d 978].) Moreover, "we do not consider … statutory language in isolation." (*Flannery*

[1] AD Rule 46.2 was enacted May 14, 2020, and operative the same day. (Register 2020, No. 20.) The emergency Rule was in effect until January 11, 2022. (Register 2022, No. 15.)

v. Prentice (2001) 26 Cal.4th 572, 578 [110 Cal. Rptr. 2d 809, 28 P.3d 860].) Instead, we "examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1040 [130 Cal. Rptr. 2d 672, 63 P.3d 228].) We believe that a similar analysis applies in harmonizing the Administrative Director rules, and to give force and effect to the public health policies reflected in the Governor's Executive Orders issued in response to the COVID public health emergency.

We agree with the WCJ that, "the clear governmental and regulatory intent as drafted in regulation section 46.2 was to prevent the conglomeration of individuals and attempt to minimize exposure to a virus about which little was known at the time." (F&O, Opinion on Decision, p. 4.) This intent is further reflected in Rule 46.2, subsection (f), which states:

> Nothing in this emergency regulation is intended to encourage or to authorize any individual, group, or business to violate any provision of Governor Gavin Newsom's Executive Order N-33-20 and related stay-at-home and social distancing protocols, or any similar such orders applicable in local jurisdictions.

Thus, AD Rule 46.2 provided for additional time for physicians to set evaluations, to minimize contact among patients and staff, and provide for appropriate social distancing as required. The text of AD Rule 46.2 also provides guidance. Subsection (b)(1) provides that the 60 and 90-day time limitations set forth in Rule 31.3 are suspended and replaced with 90 and 120-day time limitations. A party unable to obtain an appointment pursuant to Rule 46.2 may seek a replacement panel from the DWC Medical Unit *in accordance with section 31.5 of title 8 of the California Code of Regulations*. Thus, AD Rule 46.2 sets forth the appropriate time limitations in which a physician must set a QME appointment, and further contemplates Rule 31.5(a)(2) as the *remedy* in cases where a timely appointment cannot be set. Similarly, when the emergency Rules are not in effect, Rule 31.3(e) sets forth the appropriate time limitations for a physician to set an appointment under normal circumstances, and Rule 31.5(a)(2) provides the *remedy* of a replacement QME or replacement panel when a timely appointment is not possible.

Accordingly, we concur with the WCJ's reasoning that the time limitations of AD Rule 46.2(b)(1) are applicable to this matter, and that the remedy of Rule 31.5(a)(2) of a replacement QME or panel of QMEs is available only where the 90 or 120-day time limitations of the

Emergency Regulation cannot be met. Because applicant has not demonstrated irreparable harm or significant prejudice, we will deny the Petition.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 30, 2022

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

PATRICK HANSON
LAW OFFICE OF DANIEL EPPERLY
PARKER KERN NARD & WENZEL

SAR/abs

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