WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANTHONY ORIARTE, ***Applicant***

vs.

TRAVEL INN;
EMPLOYERS COMPENSATION INSURANCE GROUP, ***Defendants***

Adjudication Number: ADJ11318036
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the reconsideration of the Findings of Fact and Order, issued on September 27, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a maintenance worker on August 10, 2017, claims to have sustained industrial injury to the legs and knees. The WCJ found that the reporting of Qualified Medical Evaluator (QME) Dr. Nair was not substantial medical evidence, and there was good cause to order a replacement QME.

Defendant contends that the WCJ improperly limited the analysis to whether the reporting of the QME constituted substantial evidence instead of conducting a full hearing addressing the issue of whether applicant sustained injury arising out of and in the course of employment (AOE/COE). Defendant further contends that the WCJ failed to fully consider the evidentiary record, and that any questions as to the QME's rationale for changing his opinions should have been addressed through development of the record with the QME.

We have not received an answer from any party. 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, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant claimed injury to his legs and knees while employed as a maintenance worker by defendant Travel Inn on August 10, 2017. Defendant denies the injury arose out of and in the course of employment.

Mohan Nair, M.D., in his capacity as orthopedic QME, evaluated applicant on December 13, 2021, and issued a corresponding report. (Ex. B, Report of Mohan Nair, M.D., January 6, 2022, at p. 2.) Therein, Dr. Nair noted his receipt and review of 2,440 pages of medical records. The QME determined that "the reasonable medical probability is that Mr. Oriarte's current bilateral leg/knee impairment is caused by the 08/10/2017 industrial injury," and that applicant should be reevaluated following bilateral knee surgery and physical therapy. (*Id.* at pp. 57, 59.)

On May 25, 2022, defendant undertook the deposition of Dr. Nair. The unrepresented applicant was not in attendance at the deposition. Therein, Dr. Nair testified to a change in his previously stated opinions:

> A. Yeah, you know, I have a change in my opinion about causation. Yeah, so both those statements on the causation, the reasonable medical probability is that Mr. Oriarte's current bilateral leg, knee impairment is caused by the 8-10-2017 industrial injury; and the second statement, that there is a consequential injury, ankles, as a result of ambulatory problems, gait problems and obesity, both of those are –
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> I'm not -- I have change of opinion. I would say that I cannot to a reasonable medical probability state that Mr. Oriarte's current bilateral leg, knee impairment is caused by the 8-10-2017 industrial injury. That's my opinion.
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> Q. And what's the reason for the change?
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> A. Well, you know, -- well, you know, when you prepare for depositions, you are compelled to look at the data a lot more carefully or less hastily than you do when you have to prepare a report. And in going through it, it became obvious to me that I have no way to identify that Mr. Oriarte in fact had an injury on the day that he claims that he had an injury. And I mean, I did give him the benefit of doubt that it may have happened, but the documentation four days later makes no mention of that. And we have evidence from Mr. Oriarte's own statements that he actually drove to Las Vegas the next day. So it makes it less credible. I know I'm not the one that has to give an opinion on the individual's credibility, but the overall database, including the initial medical reports of multiple doctors starting with 8-13-2017, do not substantiate a knee injury.

> The other thing is the nature of the injury would also be hard to explain, how they could be bilateral problems. I did consider the possibility that he may have had, you know, superficial lacerations and gotten infected because he may be compromised because of obesity and drug use and things like that and possible subcutaneous injections or intravenous injections of various substances which are extensively documented in his history.
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> So I did consider all of that, that he may have had an injury to his knee that might have gotten infected, however -- which is kind of what I considered when I first saw him. But when I looked more carefully at the records in preparation for this deposition, I could simply find no way to connect an alleged injury on 8-10-2017 to the subsequent development of his problems that have been extensively identified in the records subsequent to that time.
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> (Ex. C, Transcript of the Deposition of Mohan Nair, M.D., May 25, 2022, at p. 7:2.)

The parties proceeded to trial on July 20, 2023, placing in issue, inter alia, injury AOE/COE, and whether the reporting of Dr. Nair constituted substantial medical evidence. (Minutes of Hearing (Minutes), July 20, 2023, at p. 2:15.) Following the framing of the issues and the admission of the evidence, the WCJ opined that following his review of the findings of Dr. Nair, witness testimony was unnecessary and that he intended to order that applicant be evaluated by an independent medical evaluator. (*Id.* at p. at 4:15.)

On September 27, 2023, the WCJ issued his Findings of Fact and Order. Therein, the WCJ found the "medical opinion of the Qualified Medical Examiner (QME) Dr. Mohan Nair, is not substantial evidence." (Finding of Fact No. 4.) The WCJ ordered the Medical Unit to issue a replacement panel of QMEs. The WCJ's Opinion explains:

> Here, Dr. Nair changed his opinion without setting forth proper reasoning in support of his altered conclusion regarding injury. Instead, he simply states that he has finally been more careful and less hasty in his performing his duties as a QME. In addition to falling woefully short of constituting substantial evidence in this case, this statement from Dr. Nair in his deposition raises the question of whether any of his medical-legal opinions are reliable enough to meet the substantial evidence standard if his deposition is never scheduled.
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> (Report, at p. 3.)

Defendant's Petition for Reconsideration (Petition) avers error in the WCJ's determination that no testimony was necessary, as defendant could not corroborate the medical reporting of Dr. Nair with applicant's testimony. (Petition, at p. 3:25.) Defendant further contends the QME

appropriately based his changed opinions on careful scrutiny of the medical record, and that, "[a]t the very least, the Honorable Judge Griffin had the duty to develop the medical record in this matter." (Petition, at p. 6:6.)

The WCJ's Report observes that "[a]side from admitting that he was hasty and not careful when he examined applicant in person, Dr. Nair's opinion regarding his preparation is belied by the documentation in his January 6, 2022 QME report where he attests that he spent six hours in preparing his report (including reviewing over 2,400 pages of records), whereas he stated at his eight minute deposition on May 25, 2022 that he reviewed nothing other than his lone report in preparation for his deposition." (Report, at p. 3.) The WCJ also concludes that additional evidence in the record can be evaluated once substantial medical-legal reporting has been adduced, and that a return to the existing QME in an effort to remedy deficiencies in the reporting would be futile. (*Ibid.*)

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 on employment. Accordingly, the WCJ's decision is a final order

subject to reconsideration rather than removal. Although the decision contains a finding that is final, the petitioner is only challenging interlocutory findings/orders in the decision regarding the discovery dispute. 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).)

Defendant is aggrieved by the WCJ's determination that the reporting of QME Dr. Nair is not substantial medical evidence and suggests that any perceived deficiencies in the medical reporting, or in the QME's analysis, should be remedied through directed augmentation of the record. (Petition, at 6:6.)

Applying the removal standard, we find that defendant has not established irreparable harm or undue prejudice arising out of the WCJ's order for a new panel of QMEs. We observe that the WCJ has reasonably explained the basis for his decision, and why, in the WCJ's opinion, the medical-legal conclusions reached by the QME in his deposition are not reliable. The WCJ observes that the QME has attested to receiving more than 2,400 pages of medical records and has further attested to having reviewed the medical records as "compiled and arranged" by office personnel. (Ex. B, Report of Mohan Nair, M.D., January 6, 2022, at p. 59.) In addition, Dr. Nair's report states unequivocally that he "reviewed and correlated" the medical records to applicant's history, and on that basis, the QME identified injury with industrial causation. (*Id.* at p. 51.) However, in a deposition taken outside the presence of the applicant, the QME explained that he had revised his opinions because he was "compelled to look at the data a lot more carefully or less hastily than you do when you have to prepare a report." (Ex. C, Transcript of the Deposition of Mohan Nair, M.D., May 25, 2022, at p. 7:17.) Consequently, the QME could no longer conclude that applicant's disability was caused by the claimed August 10, 2017 industrial injury. (*Id.* at p. 7:10.)

The California Supreme Court has observed that not all expert medical opinion constitutes substantial evidence upon which the Board may rest its decision. "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories." (*Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Here, the QME has testified to a diametric change in his opinions based on an admitted reexamination of the *same* medical records the QME used to originally find industrial injury. The nature of the QME's admission calls into question the reliability of the entire body of reporting and testimony. Accordingly, we decline to disturb the WCJ's findings that the reporting of QME is not substantial evidence necessitating the issuance of a new panel of QMEs. The WCJ is accorded wide latitude in the determination of discovery disputes at the trial level, and we discern no abuse of that discretion or resulting irreparable harm. (Cal. Code Regs., tit. 8, § 10955(a); *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624]; *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406].)

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/ CRAIG SNELLINGS, COMMISSIONER

***I DISSENT*. (*See separate dissenting opinion*)**

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 18, 2023

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

ANTHONY ORIARTE
BLACK AND ROSE

SAR/abs

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. I would grant defendant's Petition, rescind Finding of Fact No. 5 which finds good cause for the issuance of a replacement panel, and amend the Order to direct the parties to augment the evidentiary record with Dr. Nair as to his reasoning with respect to causation, and the circumstances surrounding his change in opinion.

It is well established that any decision, award or order of the Appeals Board must be supported by substantial evidence in light of a review of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) Moreover, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

In our en banc decision in *McDuffie v. Los Angeles County Metro. Transit Auth.* (2002) 67 Cal.Comp.Cases 138 [2002 Cal. Wrk. Comp. LEXIS 1218], we held:

> [W]here the WCJ determines after trial or submission of a case for decision that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. Each side should be allowed the opportunity to obtain supplemental or additional reports and/or depositions with respect to the area or areas requiring further development, i.e., the deficiencies, inaccuracies or lack of completeness previously identified by the WCJ and/or the Board. (*Tyler, supra*, 62 Cal. Comp.Cases at p. 928.) Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered.
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> (*McDuffie supra*, at p. 142.)

Here, as in *McDuffie*, the QME should be afforded the opportunity to address the "deficiencies, inaccuracies or lack of completeness," that are of concern to the WCJ. Providing the evaluating physician with the opportunity to amplify his opinions and to address the WCJ's concerns allows for the possibility of prompt resolution of deficiencies in the existing record without the costs and delays inherent in restarting the medical-legal process. Directed augmentation of the record with the reporting physician also advances our constitutional mandate for expeditious resolution of worker's compensation claims. (Cal. Const., Art. XIV.) Moreover,

directed augmentation of the record promotes a more comprehensive opinion on causation, based on the *entirety* of the record. (*Lamb, supra*, at p. 281.)

I therefore conclude that returning the matter to the QME for explication of his reasoning is consistent with public policy, and with our prior jurisprudence in this area. Because the order for the issuance of a new panel is prejudicial to defendant, I would grant defendant's Petition, and rescind Finding of Fact No. 5 which finds good cause for the issuance of a replacement panel. I would further amend the Order to direct the parties to augment the evidentiary record with Dr. Nair as to his reasoning with respect to causation, and the circumstances surrounding his change in opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 18, 2023

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ANTHONY ORIARTE
BLACK AND ROSE

SAR/abs

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