WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NIKOLAS FERIOLI, ***Applicant***

vs.

NASSCO, Permissibly Self-Insured, ***Defendants***

Adjudication Number: ADJ10385820
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks removal[1] in response to the Findings of Fact and Orders (F&O) issued on October 10, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an Inside Machinist by National Steel And Shipbuilding Company (NASSCO) from August 1, 2013 through August 1, 2014, claims to have sustained injury arising out of and in the course out of his employment in the form of Non-Hodgkin's Lymphoma (NHL). The WCJ ordered that the "External Memorandum" authored by NASSCO's environmental and risk assessment consultant and supporting documentation be submitted to Qualified Medical Evaluator (QME) Timur S. Durrani, M.D., with the exception of the final paragraph of the memorandum at p. 5. The WCJ also ordered that the October, 2021 report of Charles Munday, M.D., not be submitted to the QME, but also ordered that defendant was not precluded from cross-examining Dr. Durani with respect to the issues raised in the reporting of Dr. Munday.

Defendant contends that because the parties have previously agreed to submit a prior report of Dr. Munday to QME Dr. Durrani, applicant has waived objection to the submission of subsequent reporting from Dr. Munday. Defendant also avers that the QME should not be denied

[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been appointed in her place.

relevant information as to the etiology of applicant's medical condition. Defendant contends the WCJ's analysis incorrectly focuses on the admissibility of the reporting at trial, rather than what information may be provided to the QME to ensure the medical-legal reporting constitutes substantial medical evidence. Finally, defendant contends that it is inconsistent to permit defendant to cross-examine the QME on issues raised by Dr. Munday, but to prohibit the QME from reviewing the underlying report from Dr. Munday.

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 allegations of the Petition for Reconsideration 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 reconsideration, rescind the F&O issued on October 10, 2023, and return the matter to the trial level for further proceedings and decision by the WCJ.

FACTS

Applicant claimed injury in the form of Non-Hodkin's Lymphoma/angioimmunoblastic T-cell Lymphoma (NHL/AITL) while employed as an Inside Machinist by defendant NASSCO from August 1, 2013 to August 1, 2014. Defendant denies the injury arose out of and in the course of employment. The parties have selected Timur Durrani, M.D., as the QME in toxicology.

In addition to the currently pending claim brought under California law, applicant also filed a claim for workers' compensation benefits under the concurrent jurisdiction of the Longshore and Harbor Workers' Compensation Act (LHWCA). (33 U.S.C. §§ 901-50.) Pursuant to applicant's LHWCA claim, defendant obtained two reports from toxicologist Stephen Munday, M.D.

The parties to applicant's currently pending California workers' compensation claim agreed to submit Dr. Munday's initial report dated March 20, 2019, to QME Dr. Durrani. (See Ex. F, Transcript of the Deposition of Timur Durrani, M.D., dated February 20, 2020, at p. 80:6.) Dr. Durrani reviewed the reporting of Dr. Munday and issued a supplemental report on February 9, 2020. (*Id.* at p. 83:9.)

Defendant in applicant's LHWCA claim requested a supplemental report from Dr. Munday, and the requested report remained pending as of May 21, 2021. (See Ex. X, Prehearing Statement, Respondent's Exhibit List, dated May 21, 2021, at p. 4.)

On May 27, 2021, applicant requested the dismissal of his LHWCA claim. (Ex. Q, Request for Withdrawal of Claim, dated May 27, 2021.)

On June 2, 2021, defendant filed its opposition to the dismissal of applicant's LHWCA claim, contending in relevant part that applicant was seeking to avoid an adverse compensability finding. (Ex. 1, Decision and Order Granting Claimant's Motion to Withdraw, dated June 11, 2021, at p. 2.)

On June 3, 2021, applicant responded to defendant's Opposition filing. (Ex. AA, Claimant's Response to Respondent's Opposition to the Request for Withdrawal of Claim, dated June 3, 2021.) Therein, applicant averred that the decision to pursue benefits under California law was made after careful consideration and was in applicant's best interests. Applicant also averred that "there is not a single piece of evidence put forth by the Respondent that is inadmissible in the WCAB matter … [e]verything the Respondent has done to defend this claim can be used in the WCAB matter." (*Id.* at p. at p. 2.)

On June 11, 2021, the Administrative Law Judge (ALJ) in applicant's LHWCA claim granted applicant's motion to withdraw over defendant's objection. The ALJ noted that the defendant's objections that it would be prejudiced by the withdrawal were legally irrelevant and further noted, with specificity, applicant's response that "work performed to defendant Claimant's claim under the [LHWCA] Act can be used in the state law matter." (Ex. 1, Decision and Order Granting Claimant's Motion to Withdraw, dated June 11, 2021, at p. 3.)

On October 6, 2021, Dr. Munday issued a second report as requested by defendant. (Ex. A, Report of Stephen W. Munday, M.D., dated October 6, 2021.)

Defendant sought to submit the October 6, 2021 reporting of Dr. Munday and the External Memorandum authored by defendant's environmental and risk assessment consultant to QME Dr. Durrani. Applicant objected, contending the report of Dr. Munday was not admissible pursuant to Labor Code sections 4060 and 4062.1, and that the report was not allowable under section 4605 as it was not procured by the employee and was not a consulting or treating physician report. (Opinion on Decision, at p. 5.)

On September 6, 2023, the parties proceeded to trial, framing issues of whether the June 3, 2023 External Memorandum and the October 6, 2021 report of Dr. Munday could be submitted to QME Dr. Durrani. (Minutes of Hearing and Preliminary Findings (Minutes), dated September 6, 2023, at p. 2:23.)

On October 10, 2023, the WCJ issued her F&O, finding that the October 6, 2021 report of Claude (sic) Munday, M.D., was not a treating or consulting physician under sections 4600, 4062.1, or 4605. (Finding of Fact No. 3.) The WCJ ordered that the June 3, 2023 External Memorandum be submitted to the QME except for the last paragraph of page five of the document. (Order No. 1.) The WCJ further ordered that the report of Dr. Munday not be submitted to Dr. Durrani, noting that, "this does not preclude the defendant for cross-examining Dr. Durrani regarding the issues raised by Dr. Munday in the October 21, 2022 report." (Order No. 2.)

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's "Petition for Removal of WCAB Findings and Award" (Petition) avers that applicant has waived his current objection to the submission of Dr. Munday's most recent reporting to the QME because applicant has previously agreed to submit a prior report from Dr. Munday. (Petition, at 8:16.) Defendant further contends that the question presented is not whether the reporting of Dr. Munday may be relied upon as admissible evidence at trial, but rather, whether a review of Dr. Munday's reporting is necessary to the preparation of QME reporting that will constitute substantial medical evidence. (*Id.* at p. 13:16.)

Labor Code section 4060 provides, in relevant part, as follows:

> (a) This section shall apply to disputes over the compensability of any injury. This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.
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> (b) Neither the employer nor the employee shall be liable for any comprehensive medical-legal evaluation performed by other than the treating physician, except as provided in this section. However, reports of treating physicians shall be admissible.
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> (c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability *shall be obtained only by the procedure provided in Section 4062.2*.
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> (Lab. Code, § 4060(a)-(c), italics added.)

Section 4062.2 outlines the process to obtain a QME panel in represented cases for a compensability dispute per section 4060. (Lab. Code, § 4062.2.) Section 4062.2(a) specifically provides that:

> Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation *shall be obtained only as provided in this section*.
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> (Lab. Code, § 4062.2(a), italics added.)

Section 4064(d) separately provides as follows:

> The employer shall not be liable for the cost of any comprehensive medical evaluations obtained by the employee other than those authorized pursuant to Sections 4060, 4061, and 4062. *However, no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense.* In no event shall an employer or employee be liable for an evaluation obtained in violation of subdivision (b) of Section 4060. All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board *except as provided in Section 4060, 4061, 4062, 4062.1, or 4062.2.*
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> (Lab. Code, § 4064(d), italics added.)

Section 4605 states as follows:

> Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.
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> (Lab. Code, § 4605, emphasis added.)

We observe, however, that section 4605 only provides for "the right of the *employee* to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." (Lab. Code, § 4605 (italics).) This statute accordingly does not allow defendant to obtain its own expert report from a consulting or attending physician. Here, the October 6, 2021 report of Dr. Munday was obtained by defendant pursuant to applicant's then pending LHWCA

claim. Additionally, the report is now offered by defendant, not by applicant. Accordingly, we agree with the WCJ that section 4605 is not relevant to the present issue of whether the report may be submitted to the QME.

In *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 [2006 Cal. Wrk. Comp. LEXIS 313], defendant sought to compel applicant to be examined by a private doctor per section 4064(d). The Appeals Board found that "disputes regarding the compensability of the alleged industrial injury must be resolved, pursuant to section 4060(c), by the procedure provided in section 4062.2 and that an evaluation regarding compensability may not be obtained pursuant to section 4064—and, if a report is obtained, it is not admissible." (*Id.* at p. 1317.)

In *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209] (*Valdez*), the California Supreme Court analyzed the admissibility of medical reports in workers' compensation proceedings and opined in pertinent part:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports … Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board …" except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.
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> (*Valdez, supra,* at p. 1239.)

In *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [194 Cal.Rptr.3d 511, 80 Cal.Comp.Cases 1256] (*Batten*), applicant's psychiatric condition was evaluated by a panel QME who concluded that her condition was not predominantly caused by industrial factors. In response, applicant retained her own medical expert, Dr. Gary Stanwyck, who opined that she had sustained a compensable psychiatric injury. Dr. Stanwyck's report was forwarded to the QME who issued a supplemental report commenting on it. The WCJ admitted Dr. Stanwyck's report into evidence and found it convincing. He consequently issued a decision finding that applicant had sustained a compensable psychiatric injury. On reconsideration, the Appeals Board issued an opinion and decision concluding that Dr. Stanwyck's report was not admissible and the WCJ should have relied on the opinion of the QME.

Applicant sought review of the Appeals Board's decision arguing that it erred in finding Dr. Stanwyck's report inadmissible. In its opinion following review, the Court of Appeal acknowledged that only section 4061 of the five sections identified in section 4064(d) contains an express prohibition on the admissibility of a medical evaluation. (*Batten, supra*, 241 Cal.App.4th at p. 1014.) With respect to section 4605, the *Batten* Court opined:

> The Board noted that section 4605 is contained in article 2 of chapter 2 of part 2 of division 4 of the Labor Code, which is titled "Medical and Hospital Treatment." Considering this context, the Board concluded that the term "consulting physician" in section 4605 means "a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME." We agree with the Board.
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> (*Id*. at p. 1016.)

The *Batten* Court further cited with approval to the Board's significant panel decision in *Ward, supra*, noting that "because sections 4060(c) and 4062.2(a) state that medical evaluations 'shall be obtained only' by the procedure they specify, it appears the Legislature intended that this procedure be the exclusive method for obtaining medical evaluations on compensability." (*Id.* at p. 1015, citing *Ward, supra*, at p. 1316.)

Defendant contends that the analysis in *Ward, supra*, and *Batten, supra*, both address issues of admissibility of the reporting, and whether such a report can be the sole basis for an award, rather than the separate issue of whether the reporting of Dr. Munday may be submitted to QME Dr. Durrani. However, as is discussed infra, section 4605 applies in instances where applicant is offering the report. Moreover, Division of Workers' Compensation (DWC) Rule 35(e) provides that:

> In no event shall any party forward to the evaluator: (1) any medical/legal report which has been rejected by a party as untimely pursuant to Labor Code section 4062.5; (2) any evaluation or consulting report written by any physician other than a treating physician, the primary treating physician or secondary physician, or an evaluator through the medical-legal process in Labor Code sections 4060 through 4062, that addresses permanent impairment, permanent disability or apportionment under California workers' compensation laws, *unless that physician's report has first been ruled admissible by a Workers' Compensation Administrative Law Judge*; or (3) any medical report or record or other information or thing which has been stricken, *or found inadequate or*

> *inadmissible by a Workers' Compensation Administrative Law Judge, or which otherwise has been deemed inadmissible to the evaluator as a matter of law.*
>
> (Cal. Code Regs., tit. 8, § 35(e), italics added.)

Thus, Rule 35(e) prohibits the submission of reports prepared by non-treating physicians outside the medical-legal process mandated by sections 4060 and, in this instance, section 4062.2, unless the reporting is first ruled admissible by a WCJ. Medical reporting or records deemed inadmissible in workers' compensation proceedings may not be submitted to the QME. (*Ibid.*)

Defendant contends that DWC Rule 35 is inapposite, citing to our panel decision in *Harden v. County of Sacramento* (2019) 85 Cal.Comp.Cases 421 [2019 Cal.Wrk.Comp. P.D. LEXIS 504]. There, the panel majority found that the Independent Medical Examiner (IME) reporting from applicant's collateral disability retirement claim was admissible in applicant's workers' compensation claim. However, the panel majority was clear that the reporting obtained pursuant to applicant's claim for disability retirement *was not being offered as a comprehensive medical legal evaluation*. The dissenting Commissioner further opined that the parties "cannot backdoor into the record evidence that implicitly addresses applicant's level of permanent impairment and limitations from her industrial injury." (*Id.* at p. 20.) Thus, our decision in *Harden* underscores the distinction between reports "relevant to determination of the medical issue," and medical-legal reports obtained outside the process mandated under section 4060 and 4062.2. (Lab. Code, § 4062.3(a).)

Here, we also find the distinction to be relevant. The F&O prohibits defendant from submitting the October 6, 2021 reporting of Dr. Munday to the QME because it is not a consulting physician report under section 4600, 4062.1 and/or 4605. (F&O, Finding of Fact No. 3.) We believe, however, that the issue that must be addressed is whether the October 6, 2021 report of Dr. Munday is a comprehensive medical legal report, as contemplated by section 4060 and 4062.2. If the reporting is a comprehensive medical legal evaluation, and it was obtained outside the mandated procedures of section 4060 and 4062.2, it is inadmissible and under Rule 35(e) may not be submitted to the QME. (Cal. Code Regs., tit. 8, § 35(e); *Batten, supra*, at p. 1015.)

We acknowledge defendant's contention that the issue of whether the October 6, 2021 report of Dr. Munday may be submitted to the QME has been waived by applicant. Defendant observes that "[a]pplicant has already agreed to send Dr. Munday's report addressing that issue to the PQME … Any objection to updated reports on the same causation and medical research issues

have been waived based on the agreement to send the Munday opinions for consideration." (Petition, at p. 8:23.) Dr. Durrani has testified to his prior review and comment on the reporting of Dr. Munday. (Ex. F, Transcript of the Deposition of Timur Durrani, M.D., dated February 20, 2020, at p. 83:9.)

Thus, in addition to the issue of whether the reporting of Dr. Munday constitutes a comprehensive medical legal evaluation, obtained in compliance with section 4060 and 4062.2, we believe the issue of whether applicant has waived his objection to the submission of any reporting from Dr. Munday to the QME must be considered and addressed herein.

Accordingly, we will grant reconsideration and, applying the removal standard, rescind the F&O and return the matter to the trial level for further proceedings and for the WCJ to issue a new decision from which any aggrieved person may seek reconsideration.

Finally, we note that defendant also seeks to submit the External Memorandum authored by Renee Kalmes, defendant's environmental and risk assessment consultant, to the QME. The final paragraph of the Memorandum contains a summary and conclusion regarding the timeline of events investigation and regulatory findings at pp. 3-5. Although we are rescinding the F&O in its entirety, to the extent that the final paragraph of the memorandum encapsulates the consultant's findings expressed in the Memorandum, we discern no prejudice in including that information as an integral component of the memorandum that is otherwise being submitted to the QME. The QME is, of course, free to formulate his own opinions as to the persuasive value of the Memorandum.

In summary, we concur with the WCJ's analysis that section 4605 is not relevant to the issue of the submission of the October 6, 2021 report of Dr. Munday, obtained by defendant, to the QME. We conclude however that the issues that must be addressed herein are whether the reporting of Dr. Munday is properly considered a comprehensive medical legal report, whether the report was obtained in compliance with section 4060 and 4062.2, and whether applicant has waived his objection to the submission of the October 6, 2021 report of Dr. Munday to the QME. Accordingly, we will grant reconsideration, rescind the October 10, 2023 F&O, and return the matter to the trial level for further proceedings and decision by the WCJ. Any aggrieved person may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision issued on October 10, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision issued on October 10, 2023 is **RESCINDED** and that the matter **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 2, 2024

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

NIKOLAS FERIOLI
HIDEN, ROTT & OERTLE
ENGLAND, PONTICELLO & ST. CLAIR

SAR/abs

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