

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

JOHNNY BAIRD, *Applicant*

vs.

**WAREHOUSE SPECIALISTS, INC.; TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ10267198
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in this matter to further study the factual and legal issues presented. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration, or, in the alternative, removal, in response to the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on June 16, 2021. As relevant herein, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to various body parts, that Saeed Nick, M.D., was applicant's primary treating physician, that the utilization review of Dr. Nick's February 14, 2020 request for authorization (RFA) of 24-hour home healthcare services was untimely, and that Dr. Nick's medical reporting is not substantial medical evidence.

Applicant contends, as relevant herein, that the WCJ's conclusion that the reporting of Dr. Nick was not substantial medical evidence is not supported by the evidence submitted at trial, and that defendant's utilization review of Dr. Nick's February 14, 2020 RFA was untimely.

Defendant filed an answer contending the WCJ's determination that the reporting of Dr. Nick was not substantial medical evidence is correct, and that applicant has not suffered irreparable harm or substantial prejudice. Defendant does not dispute the WCJ's determination that the utilization review of Dr. Nick's February 14, 2020 request for authorization (RFA) of 24-hour home healthcare services was untimely. We received a Report and Recommendation (Report) from the WCJ on the Petition for Reconsideration.

We have considered the allegations of the Petition for Reconsideration and Removal and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, we will treat the Petition as one for reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision.

FACTUAL BACKGROUND

Applicant claims he sustained injury to various body parts during the cumulative period from January 11, 2015 to January 11, 2016, while employed by the defendant as a warehouse worker. Saeed Nick, M.D., is applicant's primary treating physician.

The parties proceeded to Expedited Trial on June 16, 2021. According to the Minutes of Hearing, the stipulations, as relevant herein, were that applicant sustained injury to various body parts during the cumulative period from January 11, 2015 to January 11, 2016 while employed by the defendant as a warehouse worker, and Saeed Nick, M.D., is applicant's primary treating physician. The issues, as relevant herein, were attorney fees, the need for 24-hour home healthcare services, timeliness of utilization review, and applicant's request for a home healthcare services assessment. Applicant claims defendant did not timely issue utilization review of Dr. Nick's February 14, 2020 RFA for 24-hour home healthcare services. The exhibits admitted into evidence, as relevant herein, were: PR-2 and RFA of primary treating physician Saeed Nick, M.D., dated February 26, 2021 (Applicant's Exhibit 5); PR-2 and RFA of Saeed Nick, M.D., dated August 7, 2020 (Applicant's Exhibit 8); and utilization review dated August 17, 2020 (Applicant's Exhibit 9).

On June 16, 2021, the WCJ issued his Findings of Fact and Opinion on Decision and found applicant, while employed by the defendant during the cumulative period from January 11, 2015 through January 11, 2016 as a warehouse worker, sustained injury arising out of and occurring in the course of employment to various body parts. The WCJ further found that Dr. Nick issued an RFA on February 14, 2020 for home healthcare services and a walker with wheels and that the defendant did not timely issue utilization review for this RFA. The WCJ then found that Dr. Nick's medical reporting was not substantial medical evidence.

In his petition, applicant seeks an award of 24-hour home healthcare services as requested in Dr. Nick's February 14, 2020 RFA. Alternatively, applicant requests further development of the record as to whether the requested treatment is reasonable and medically necessary to cure or

relieve the effects of the industrial injury. As stated *supra*, defendant filed an answer and did not dispute the WCJ's determination that the utilization review of the February 14, 2020 RFA was untimely. However, the defendant raises the issue of whether the requested treatment was reasonable and medically necessary to cure or relieve the effects of the industrial injury.

The WCJ issued a Report and Recommendation on the Petition for Reconsideration reiterating his findings from the June 16, 2021 Findings of Fact.

DISCUSSION

I.

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.)¹ 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]; *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].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Id.* at p. 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the defendant’s answer does not challenge the WCJ’s finding regarding timeliness of the utilization review of the February 14, 2020 RFA; utilization review is a jurisdictional issue and therefore is a final order if decided at the Expedited Trial. Additionally, pursuant to Labor Code section 4610(k), because “[a] utilization review decision to modify or deny a treatment recommendation shall remain effective for 12 months from the date of the decision...”, an order by the WCJ regarding utilization review in this context would also be considered final.

¹ All statutory references not otherwise identified are to the Labor Code.

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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, for the reasons explained above, the issues before us are threshold issues; therefore, we consider the petition as one for reconsideration.

II.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313. An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall “. . . make and file findings upon all facts involved in the controversy[.]” (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc)² (*Hamilton*)). As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at 475.) The purpose of this requirement is to enable “the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]” (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

The Appeals Board's record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator's file, if any. Documents that are in the adjudication file but have not been received or

² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, former § 10341, now § 10325(a) (eff. Jan. 1, 2020); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

offered in evidence are not part of the record of proceedings. (Cal. Code Regs., tit. 8, former § 10544, now § 10750 (eff. Jan. 1, 2020).)

The WCJ has the duty to develop the record and the authority to order additional medical evidence as required so that the decision is based on substantial evidence.³ Here, the February 14, 2020 RFA was not admitted into evidence. While we do not disagree that utilization review was likely untimely, without the RFA admitted into evidence at the Expedited Trial, we cannot make that determination regarding timeliness.

The issue of medical treatment is a final order; however, because the February 14, 2020 RFA is not in evidence, accordingly we must rescind the June 16, 2021 Findings of Fact. In the absence of an evidentiary record, we are unable to evaluate the basis for the WCJ's Findings of Fact. Therefore, we must return this matter to the trial level for further proceedings.

Accordingly, we grant applicant's Petition, rescind the June 16, 2021 Findings of Fact, and return the matter to the WCJ for further proceedings consistent with this decision.

³ Lab. Code, §§ 5701, 5906; *Old Republic Ins. Co. v. Workers' Comp. Appeals Bd.* (2020) 85 Cal.Comp.Cases 504, 508 [2020 Cal. Wrk. Comp. LEXIS 26] (writ den.); *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 [2002 Cal. Wrk. Comp. LEXIS 1218] (Appeals Board en banc); see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the workers' compensation appeals board judge's June 16, 2021 Findings of Fact is **RESCINDED** and the matter is **RETURNED** to the WCJ 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

SEPTEMBER 24, 2021

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

**JOHNNY BAIRD
KJT LAW GROUP
WOOLFORD & ASSOCIATES**

HAV/ara

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