**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

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| **TSEGAY MESSELE,**<br>***Applicant,***<br>**vs.**<br>**PITCO FOODS, INC.; CALIFORNIA INSURANCE COMPANY,**<br>***Defendants.*** | **Case No. ADJ7232076**<br><br>**OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)** |

On November 4, 2011, we granted reconsideration of our September 26, 2011 Opinion and Decision After Reconsideration, Order Granting Removal, and Decision After Removal (En Banc)[1] on our own motion and issued a notice of intention to modify the September 26, 2011 decision to provide that the principles set forth in that decision shall apply to other cases prospectively from September 26, 2011.[2] We allowed anyone wishing to respond to our proposed modification ten days from service of the notice of intention, plus five calendar days for mailing (Cal. Code Regs., tit. 8, § 10507(a)(1)), within which to file written comments.

The time period for filing comments has elapsed, and we have not received any comments in response to our November 4, 2011 notice of intention. Having received no comments in opposition to our notice of intention, we will now amend our September 26, 2011 decision to clarify that it shall apply to other cases prospectively from September 26, 2011.

In our September 26, 2011 decision, we addressed questions associated with the timeline set forth in Labor Code section 4062.2(b)[3] for selecting an agreed medical evaluator (AME) and requesting a

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[1] *Messele v. Pitco Foods, Inc*. (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc).

[2] 2011 Cal. Wrk. Comp. LEXIS 172.

[3] All further statutory references are to the Labor Code.

panel qualified medical evaluator (QME). We held,

> "(1) when the first written AME proposal is 'made' by mail or by any method other than personal service, the period for seeking agreement on an AME under Labor Code section 4062.2(b) is extended five calendar days if the physical address of the party being served with the first written proposal is within California; and (2) the time period set forth in Labor Code section 4062.2(b) for seeking agreement on an AME starts with the day after the date of the first written proposal and includes the last day." (*Messele v. Pitco Foods, Inc*. (2011) 76 Cal.Comp.Cases 956, 958 (*Appeals Board* en banc).) (Footnotes omitted.)

As we explained in our November 4, 2011 notice of intention,

> "Our intention in issuing the September 26, 2011 decision was to clarify the existing law on issues not previously addressed in a binding Appeals Board decision and to prevent inconsistencies in rulings by WCJs and Appeals Board panels. It was not our intention to throw into uncertainty the validity of QME panels previously obtained in ongoing workers' compensation proceedings or to allow parties, based on our decision, to challenge the timeliness of a panel request or the validity of panels to which they had not previously objected solely because, after the fact, they were displeased with the make-up of the panel or, worse, because the resulting QME evaluation produced a report unfavorable to their client. It was also not our intention to allow reopening of any orders, decisions, or awards based on our decision. (See Lab. Code, §§ 5803, 5804.)" (2011 Cal. Wrk. Comp. LEXIS 172.) (Footnote omitted.)

In addition, the DWC Medical Unit had been overburdened with panel requests even before our September 26, 2011 decision inadvertently increased the likelihood of multiple panel requests being made in the same case. We did not wish to exacerbate the delay in parties obtaining QMEs to report on disputes involving compensability, medical treatment, and disability. Furthermore, we did not wish to encourage litigation over which of multiple QME panels is the correct panel, when the Legislature's obvious intent in establishing the statutory procedure was to streamline the evaluation process.

When it became apparent that our September 26, 2011 decision, while resolving some of the issues relating to the timing of QME panel requests, had created confusion about the status of many ongoing proceedings and potentially contributed to further litigation and delay over previously uncontested evaluations, we issued our notice of intention to clarify our prior decision to explain its application to ongoing cases.

In *Farris v. Industrial Wire Products* (2000) 65 Cal.Comp.Cases 824, 832 (Appeals Board en banc) (*Farris*), we discussed the need and appropriateness of applying some decisions prospectively:

> "In workers' compensation cases, it is not uncommon to provide that newly stated judicial rules **or newly stated judicial interpretations of statutes** shall be applied prospectively only. Such a declaration of prospective application is made primarily to prevent a landslide of reopenings in previously adjudicated workers' compensation cases,[8] which would burden the workers' compensation system and result in unfairness to those parties who had relied on a different understanding of law or had accepted a different application of the law; a declaration of prospective application may also be made to harmonize statutory provisions. (E.g., *LeBoeuf v. Worker's Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 246, fn. 13 [193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal.Comp.Cases 587, 597, fn. 13]; *Summer v. Worker's Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 972-973 [191 Cal. Rptr. 811, 663 P.2d 534, 48 Cal.Comp.Cases 369, 375]; *Atlantic Richfield Co. v. Worker's Comp. Appeals Bd*. (*Arvizu*), *supra*, 31 Cal.3d at pp. 727-728 [47 Cal.Comp.Cases at pp. 509-510]; *Estrada v. Worker's Comp. Appeals Bd*. (1997) 58 Cal.App.4th 1458, 1472-1473 [69 Cal. Rptr. 2d 176, 62 Cal.Comp.Cases 1384, 1394-1395]; *Messina v. Worker's Comp. Appeals Bd.* (1980) 105 Cal.App.3d 964, 971-972 [164 Cal. Rptr. 762, 45 Cal.Comp.Cases 505, 510-511]; *cf.*, *Camper v. Worker's Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 688-690 [12 Cal Rptr. 2d 101, 836 P.2d 888, 57 Cal.Comp.Cases 644, 650-652].) Although decisions regarding procedural issues are more commonly given prospective effect than are decisions regarding substantive issues (e.g., *Camper v. Worker's Comp. Appeals Bd.*, *supra*, 3 Cal.4th at p. 688 [57 Cal.Comp.Cases at pp. 651-652]), decisions affecting an applicant's substantive right to receive or a defendant's substantive duty to pay workers' compensation benefits will be applied prospectively under appropriate circumstances. [Emphasis added.]
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> [8] The Board has continuing jurisdiction over its decisions and, within five years of an injured employee's date of injury, a Board decision can be reopened upon a showing of good cause. (Lab. Code, §§ 5803, 5804.) Ordinarily, a change in the judicial interpretation of a statute will constitute 'good cause' to reopen a Board decision which had been based on prior law. (*Atlantic Richfield Co. v. Workers' Comp. Appeals Bd*. (*Arvizu*) (1982) 31 Cal.3d 715, 727-728 [182 Cal. Rptr. 778, 644 P.2d 1257, 47 Cal.Comp.Cases 500, 509]; S*tate Comp. Ins. Fund v. Industrial Acc. Com.* (*Dean*) (1946) 73 Cal.App.2d 248, 257 [166 P.2d 310, 11 Cal.Comp.Cases 30, 36].)"

In *Farris*, we concluded that our decision in that case, on the application of section 5814 penalties to unreasonably delayed section 4650(d) penalties, should be applied prospectively to avoid "an undue burden on the administration of justice in the workers' compensation system" and the "overwhelming adverse effect on the workers' compensation system and on the reasonable expectations of the parties participating in it." (65 Cal.Comp.Cases at p. 833.)

These considerations apply equally to the purely procedural issues addressed in the present case. Having invited comments from the community on our proposed modification and having received no comments in response to our notice of intention, we now amend our September 26, 2011 decision to clarify that it shall apply prospectively from September 26, 2011. Specifically, if prior to our September 26, 2011 decision, a panel was prematurely but otherwise properly requested and there was no objection on the ground of prematurity, then the resulting panel may not later be challenged on that ground. In other words, if an objection based on prematurity was not made prior to our September 26, 2011 decision, neither party may challenge the request, the ensuing panel, the remaining QME following the striking of names, or the resulting report for prematurity. Of course, other grounds for challenge may exist and are not affected by this modification of our decision. Moreover, our September 26, 2011 decision does not constitute good cause to reopen any order, decision, or award.

Thus, for example, if a QME evaluation has already taken place, our September 26, 2011 decision does not provide grounds for a new one. If the DWC Medical Unit has already issued a panel and no objection based on the panel request's prematurity was raised prior to our September 26, 2011 decision, that panel may not be challenged based on our September 26, 2011 decision. If an otherwise proper panel request was made, and was premature according to our September 26, 2011 decision, but no objection based on its prematurity was raised prior to September 26, 2011, any panel subsequently issued in response to that request shall not be invalidated based on that decision.

If, on the other hand, a panel request was made prior to our September 26, 2011 decision, which was premature according to that decision, and the opposing party promptly objected **on that basis** before the September 26, 2011 decision issued, the objecting party is entitled to the benefit of its correct interpretation of section 4062.2(b) because the party timely raised the issue in its own case. We express no opinion at this time as to what constitutes an adequate objection.

Undoubtedly there will be cases where application of the principles expressed herein and in our prior decision will not be clear, and the parties in those cases may seek initial resolution of any disputes by a WCJ. Nevertheless, regardless of the certain existence of a few difficult cases, we wish to avoid "a landslide of reopenings" (*Farris, supra*, 65 Cal.Comp.Cases at p. 832; *Atlantic Richfield Co. v. Workers'*

*Comp. Appeals Bd.* (*Arvizu*) 31 Cal.3d 715, 728 [47 Cal.Comp.Cases 500, 509]) or other objections to panels, to which the parties had previously acquiesced, and to reports that have already issued and may have formed the basis for settlements.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), that the September 26, 2011 Opinion and Decision After Reconsideration, Order Granting Removal, and Decision After Removal (En Banc) is **AFFIRMED, EXCEPT** that it is **AMENDED** to add the following order:

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**IT IS FURTHER ORDERED** that application of the principles expressed in the September 26, 2011 Opinion and Decision After Reconsideration, Order Granting Removal, and Decision After Removal (En Banc) to other cases shall be prospective from September 26, 2011, as explained in this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

*/s/ Joseph M. Miller*
***JOSEPH M. MILLER, Chairman***

*/s/ Frank M. Brass*
***FRANK M. BRASS, Commissioner***

*/s/ Ronnie G. Caplane*
***RONNIE G. CAPLANE, Commissioner***

*/s/ Alfonso J. Moresi*
***ALFONSO J. MORESI, Commissioner***

*/s/ Deidra E. Lowe*
***DEIDRA E. LOWE, Commissioner***

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

11/22/2011

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

**JOHN HILL**
**TSEGAY MESSELE**
**MONIKA HIGHT**

**CB/bea**