WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JULIE VIOR, *Applicant*

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Permissibly Self-Insured, administered by SEDGWICK CMS, *Defendants*

Adjudication Numbers: ADJ8555784, ADJ9828972 (MF)
Santa Barbara District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks removal in response to the Opinion and Decision After Reconsideration issued by this Appeals Board on October 3, 2023.[1] In that decision, which was occasioned by defendant's previous petition for reconsideration, we partially affirmed and partially amended the Findings and Awards issued by the workers' compensation administrative law judge ("WCJ") on January 19, 2021.

In ADJ8555784, the WCJ had found that applicant, while employed as a painter during the period February 20, 1996 through February 25, 2015, sustained industrial injury to her elbows, wrists, and hands, resulting in permanent disability of 13%. In our decision of October 3, 2023, we affirmed the WCJ's decision in ADJ8555784, but we amended it to reflect the correct type of injury, the correct body part, and the correct date of injury: applicant sustained a specific injury to her right knee on February 9, 2011, resulting in permanent disability of 13%.

In ADJ9828972, the WCJ had found that applicant, while employed as a painter during the period February 20, 1996 through February 25, 2015, sustained industrial injury to her elbows, wrists, hands and right shoulder, and that as a result of this injury applicant is entitled to an award of permanent and total disability under the 2005 Schedule for Rating Permanent Disabilities

[1] Commissioner Katherine Williams Dodd signed the Opinion and Decision After Reconsideration dated October 3, 2023, but she presently is unavailable to participate in this matter. Therefore, a new panel member has been substituted in her place.

("PDRS"), without apportionment to a September 21, 2010 Stipulated Findings & Award for 68.5% permanent disability under the 1997 PDRS. (The September 21, 2010 Award resulted from a prior cumulative trauma injury during the period March 1, 1995 through February 29, 1996 to applicant's bilateral wrists, bilateral thumbs, and bilateral elbows, in ADJ5521632.)

In our decision of October 3, 2023, we affirmed the WCJ's decision in ADJ9828972 but we amended it because we found unresolved issues pertaining to permanent disability and apportionment. We amended the WCJ's decision to defer the issues of permanent disability and apportionment, as well as attorney's fees, pending further proceedings and new determination by the WCJ at the trial level. Concerning ADJ9828972, we stated that the WCJ must revisit and resolve whether Dr. Newton's reporting constitutes substantial evidence of apportionment under Labor Code section 4663, pursuant to the standards set forth in with *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc). We also stated:

> …[T]he WCJ must address whether or not [Labor Code] section 4664(c)(1)(E) applies. The prior stipulated Award of 68.5% permanent disability for the earlier cumulative trauma injury - all to the upper extremities - must be considered, unless the WCJ determines that applicant has lost the use of both hands, which would generate a conclusive presumption of permanent and total disability pursuant to section 4662(a)(2). Otherwise, it appears that only 31.5% permanent disability (100%-68.5%) may be available to award for the subsequent cumulative trauma in ADJ9828972. Further, if section 4664(c)(1) does apply, it appears there would be no basis for apportionment under section 4663 because the prior Stipulated Award already accounts for it. However, the WCJ also must consider that if he finds applicant has lost the use of both hands, which justifies a presumed permanent and total disability, then there can be no apportionment of that disability. As mentioned before, the WCJ should further develop the medical record, as necessary or appropriate, to resolve the issues discussed in this opinion. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [Appeals Board en banc].)

In the instant petition for removal, applicant contends that she will suffer significant prejudice and irreparable harm by reason of our October 3, 2023 decision. Specifically, applicant alleges that according to Dr. Newton, there was a single cumulative trauma injury during applicant's entire period of employment, that this injury cannot be "artificially separated into smaller cumulative traumas," and that there are findings of record showing that applicant sustained a single cumulative trauma injury which encompassed "every single day" of her employment from 1993 through February 15, 2015. Applicant also alleges that defendant did not meet its burden of

proving apportionment under Labor Code sections 4663 and 4664, that there is no basis to provide defendant with more time to develop the record on apportionment because it failed to do so for six years, that applicant "should be entitled to a 100% Award less the permanent disability paid on the prior award to avoid double payment," that applicant has a right to expeditious resolution of her case pursuant to Article XIV, Section Four of the California Constitution, and that to avoid substantial prejudice occasioned by further delay of a final resolution, removal should be granted to reinstate the WCJ's Award of 100% permanent disability.

Defendant filed an answer.

Preliminarily, we observe that 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, 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 petition for reconsideration once a final decision is issued.

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 petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, our decision of October 3, 2023 is a hybrid decision. This is because on one hand, it affirmed the WCJ's threshold finding in ADJ9828972 that applicant sustained industrial injury to her elbows, wrists, hands and right shoulder during the period February 20, 1996 through February 25, 2015. On the other hand, our October 3, 2023 decision included an interlocutory ruling that the WCJ should further develop the medical record, as necessary or appropriate, to

resolve the issues discussed in our decision. Here, the essence of applicant's petition for removal is her complaint that the record should not be further developed because it will delay final resolution of her claim in ADJ9828972, resulting in significant prejudice or irreparable harm. Accordingly, we will evaluate the issues raised by applicant's petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm.

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, § 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, applicant's first two contentions amount to one allegation that the record justifies a finding she sustained a single cumulative trauma while employed by defendant, from 1993 through February 25, 2015. However, applicant does not explain how the absence of such a finding will result in significant prejudice or irreparable harm, and she does not demonstrate that reconsideration will be an inadequate remedy if a final decision adverse to her is ultimately issued.

Applicant also contends that defendant failed to meet its burden of proving apportionment under Labor Code sections 4663 and 4664, and that it was improper for the Board to disregard this alleged failure by allowing further development of the record. However, the premise of the contention is incorrect because there is no finding or conclusion in our opinion of October 3, 2023 that defendant met its burden of proving apportionment. More importantly, applicant fails to explain how our instruction to the WCJ to request that Dr. Newton review the available medical records regarding the prior cumulative trauma injury and attempt to rate the disabilities caused by each of the two cumulative trauma injuries, using factors identified in the 2005 PDRS to address apportionment under Labor Code section 4664(b), will result in significant prejudice or irreparable harm. Nor does applicant demonstrate that reconsideration will be an inadequate remedy if there is a final determination on apportionment that is adverse to her.

Applicant cites various Appeals Board panel decisions for the proposition that the Board's authority to further develop the record cannot be used to rescue a defendant from its failure to

prove apportionment. While panel decisions may provide guidance in a particular case, they do not constitute binding authority. Moreover, the basis of our decision of October 3, 2023 was not limited to the issue of whether or not defendant met its burden of proving apportionment. Rather, we found unresolved questions about potential overlap between applicant's prior and present disabilities, and about certain provisions of Labor Code section 4664 that had not been addressed by the WCJ. In relevant part, our prior opinion stated:

> …[T]he WCJ must address whether or not section 4664(c)(1)(E) applies. The prior stipulated Award of 68.5% permanent disability for the earlier cumulative trauma injury - all to the upper extremities - must be considered, unless the WCJ determines that applicant has lost the use of both hands, which would generate a conclusive presumption of permanent and total disability pursuant to section 4662(a)(2). Otherwise, it appears that only 31.5% permanent disability (100%-68.5%) may be available to award for the subsequent cumulative trauma in ADJ9828972. Further, if section 4664(c)(1) does apply, it appears there would be no basis for apportionment under section 4663 because the prior Stipulated Award already accounts for it. However, the WCJ also must consider that if he finds applicant has lost the use of both hands, which justifies a presumed permanent and total disability, then there can be no apportionment of that disability. […]

Here, there is no allegation in applicant's petition for removal that the above analysis is erroneous. Nevertheless, applicant alleges that our October 3, 2023 decision will result in further delay in finally resolving the issue of permanent disability in ADJ9828972, violating her right to an "expeditious resolution" of her case, pursuant to Article XIV, Section Four of the California Constitution.[2] We reject the allegation because the provision's reference to the 'expeditious administration of substantial justice' is not self-executing, meaning that it does not create an

[2] In relevant part, this constitutional provision states: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving them from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; […] full provision for adequate insurance coverage against liability to pay or furnish compensation; […] and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, *to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character*; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government." (Italics added.)

independent right in applicant to enforce the provision directly against the Appeals Board. (*Bautista v. State of California* (2011) 201 Cal.App.4th 716, 729 [76 Cal.Comp.Cases 1282].)

In this case, therefore, Section Four of Article XIV of our state constitution does not require us to affirm the WCJ's decision of January 19, 2021 or to render a final decision on permanent disability within a certain amount of time, as alleged by applicant. This is because applicant's right to a final determination of permanent disability is subject to Labor Code section 5906. Pursuant to this statute, which does not itself include a time limit, the Legislature has expressly granted authority to the Board to "amend the order, decision, or award made and filed by…the [WCJ] on the basis of the evidence previously submitted in the case, or [the Board] may grant reconsideration and direct the taking of additional evidence."

For the foregoing reasons,

IT IS ORDERED, that applicant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 22, 2023

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

JULIE VIOR
STOUT, KAUFMAN, HOLZMAN & SPRAGUE, APLC
HOURIGAN, HOLZMAN & SPRAGUE
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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*