WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NEIDE SERRANO, ***Applicant***

vs.

HADDADIN HOLDINGS, LLP; REDWOOD FIRE AND CASUALTY INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Number: ADJ15494924
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Cost Petitioner, Scandoc Imaging, Inc., has petitioned for reconsideration of the Findings of Fact and Order issued and served by the workers' compensation administrative law judge (WCJ) in this matter on October 3, 2023. In that decision, the WCJ found that the costs sought by Scandoc Imaging, Inc., were not valid medical legal costs. The WCJ further found that defendants were denied due process by not being served with the subpoena and ordered that Cost Petitioner was take nothing on their cost petition, and that all other issues raised by the parties were moot.

Cost Petitioner contends that the costs were valid medical costs and requests that the decision of the WCJ be rescinded and the matter be remanded back to the trial level for further proceedings.

Defendant filed a response to the Petition requesting that the petition be denied.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition.

We have reviewed the allegations in the Petition for Reconsideration, and the contents of the Report.

Based upon our preliminary review of the record, we will grant Cost Petitioner's Petition for Reconsideration, and we will order that this matter be referred to a WCJ or designated hearing officer of the Appeals Board for a status conference. Our order granting the Petition for

Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Preliminarily, we note the following in our review:

The Opinion on Decision of the WCJ in this matter accompanying the Findings and Order stated in pertinent part:

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> Cost petitioner asserts that they are entitled to costs, penalties, sanctions and legal fees. Defendants object in part asserting that the costs are not medical legal costs and were unreasonable and unnecessary.
>
> It is well established that photocopy costs are medical legal costs. However, as to the medical records subpoenaed, those had previously been provided to the Applicant and her attorney. There was no dispute or issue, they were not provided to the QME and did not go to prove or disprove any contested issue. The services were provided within the first ninety (90) days of the filing of the application and the application alone did not create a contested claim.
>
> At best, cost petitioner is entitled to be paid for the personnel records. However, there was no contested issue or dispute at the time the subpoena was served on the employer. Defendants had provided the benefit notices and printout prior to the subpoena and Applicant's counsel did not raise any dispute or issue once those documents were received. The other problematic issue is that defense counsel was not served with the subpoena so could not take action, ie provide those documents informally if there were a dispute nor, for example, file a motion to quash to address if the subpoena was proper. This denied Defendants due process…

The record reflects that applicant, who was unrepresented on July 16, 2021, received correspondence from defendant Berkshire Hathaway Homestate Insurance, in which defendant issued an objection to the medical reporting of Dr. Gregory Disham Bouyer dated June 22, 2021, with respect to the issues of temporary disability, maximum medical improvement, medical treatment and medical eligibility for vocational benefits. Applicant was sent a QME Form 106 along with the July 16, 2021 correspondence, also known as a request for Qualified Medical

Evaluator Panel (Unrepresented Employee) and was requested to fill out the form and choose a specialty for the physician (Ex.1).

Applicant appears to have been originally scheduled for an evaluation with Panel Qualified Medical Evaluator (QME) Vicente R. Bernabe on October 20, 2021 (Ex. 2).

On November 11, 2022, applicant obtained legal counsel and served a notice of representation on defendant demanding legal documents and records in defendant's possession (Ex. 3).

Thereafter, subpoenas for copies of records from Kaiser Permanente, as well as the employer and carrier issued, the first of which issued on December 30, 2021. (Exhibits 4-7).

Applicant was eventually examined by Dr. Bernabe on December 15, 2021, and a medical report issued dated January 14, 2022. The case was settled by a Compromise and Release dated June 6, 2022 and an Order approving issued on June 14, 2022. Settlement was based upon the medical reporting of Dr. Bernabe. (Compromise and Release, June 6, 2022, p. 7).

Cost Petitioner asserts in his petition for reconsideration that at the time the copy services were issued, there was clearly a contested claim, and that since AD Rule 9793(e) (Cal. Code Regs., § 9793(e)), defines a disputed medical fact as "an issue in dispute, including an objection under Section 4062 of the Labor Code to a medical determination made by a treating physician…" , that the July 16, 2021 letter constitutes such an objection.

Cost Petitioner also states that the WCJ erred in failing to address all issues, including the issue of "If the Cost Petitioner's bills are not a medical/legal cost, will they still be entitled to collect as a general cost under Labor Code § 5811."

Finally, it is asserted that the failure to properly serve defendant with the subpoenas in question is not sufficient to deny them payment in the absence of a showing of prejudice to defendant for the failure to do so. In support of this proposition, petitioner avers in their Petition for reconsideration:

> The WCJ found that "*Defendants were denied due process by not being served with the subpoenas.*" (Opinion on Decision, 10/03/2023, p. 2-3 para.3, to p.3 para.1**)**. The WCJ cannot presume prejudice on behalf of the Defendant, it is Defendant's duty to prove prejudice with evidence at trial. The WCAB has held on multiple occasions that this defense requires defendants assert this position upon first knowledge, and prove prejudice/injury.

> . . .defective service does not necessarily equate to a due process violation. There must be a showing that the defective service was prejudicial and caused injury *(Maria De Los Angeles De Saucedo v. Ironwood Packaging, ICW* (2018) (ADJ931969));, The failure to serve the subpoena on defense counsel does not invalidate the subpoena.. .if defense counsel then because aware of the subpoena and took no action challenging the subpoena or contesting the copying service, arguably, defendant waived the right to challenge the reasonableness or necessity of the copying costs. *(Miguel Rodriguez v. 4R-Ranch Market, Barrett Business* (2018)(ADJ9119233)); While it appears that lien claimant failed to serve the SDTs on defense counsel pursuant to former WCAB Rule 10510, defective service does not necessarily equate to a due process violation. There must be a showing that the defective service was prejudicial and caused injury. Defense counsel essentially argues that he is prejudiced because he was unable to file a petition to quash the SDTs. We give little weight to this argument as defense counsel has failed to point to evidence that he timely raised the issued (sic) of section 4055.2 and former WCAB Rule 10510 after becoming aware of applicant's SDTs. In fact, in defendant's only objections to lien claimant's invoices, defendant does not raise the SDT service issue. Thus, defendant has not demonstrated prejudice and injury. Based on the record, lien claimant has satisfied its burden of proof pursuant to section 4621. (*Lori Norton v. Western Medical Center, Sentry Stevens Point* (2020) (ADJ9314377))

Defendants failed to admit any evidence that they suffered any prejudice as a result of any lack of notice, and as such, Cost Petitioner's billings cannot be disqualified (Petition, page 7, lines 6-24)."

II.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also 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.)

Labor Code section 5310 states in relevant part that: "The appeals board may appoint one or more workers' compensation administrative law judges in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers' compensation administrative law judge the proceedings on any claim. . . ." (See also Lab. Code, §§ 123.7, 5309.)

Thus, we will order the matter to a status conference before a WCJ at the Appeals Board.

III.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) 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. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation

proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["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"].)

Labor Code section 5901 states in relevant part that:

"No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant Cost Petitioner's Petition for Reconsideration, order that this matter be set for a status conference, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that Cost Petitioner's Petition for Reconsideration of the Findings of Fact and Order issued on October 3, 2023 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge or assigned designee of the Appeals Board. Notice of date, time, and format of the conference will be served separately, to be heard in the Lifesize electronic platform, in lieu of an in person appearance at the San Francisco office of the Appeals Board.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 12, 2023

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

LITIGATION AND CONSULTING ASSOCIATES, APLC
DORMAN & SUAREZ, LLP

AS/*ara*

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