WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALMA JUSTO, *Applicant*

vs.

CONSOLIDATED STAFFING SOLUTIONS, INC.; UNITED WISCONSIN INSURANCE COMPANY; CITISTAFF SOLUTIONS, INC.; OLD REPUBLIC INSURANCE COMPANY; *Defendants*

Adjudication Number: ADJ13009187
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the September 20, 2024 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found chiropractic panel 7653853 to be invalid and ordered cancellation of any resulting evaluations.

Applicant, who claimed a cumulative work injury from February 15, 2019, through February 15, 2020, to her psyche, head, jaw, bilateral legs, and lumbar spine against defendant employers, Citistaff Solutions, Inc. (Citistaff) and Consolidated Staffing Solutions, Inc. (Consolidated Staffing), contends that panel 7653853 was validly obtained pursuant to Labor Code[1] sections 4060 and 4062.2. Applicant further contends that she is entitled to not elect against a defendant and in doing so, is able to proceed against all defendants individually, including requesting additional QME panels. (See *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd*. (*Garcia*) (1997) 60 Cal.App.4th 548, 554-556 [62 Cal.Comp.Cases 1661]; *Chanchavac v. LB Indus.* [2015 Cal. Wrk. Comp. P.D. LEXIS 516].)

[1] All further statutory references are to the Labor Code unless otherwise noted.

We have not received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration (Petition) and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition and rescind and substitute the September 20, 2024 F&O to reflect that chiropractic panel 7653853 is valid.

FACTS

Applicant claimed that while employed by defendant, Citistaff, as a process worker during the period from February 15, 2019 through February 15, 2020, she sustained an industrial injury to her psyche, head, jaw, bilateral legs, and lumbar spine. At the time, Citistaff was insured by Old Republic Insurance Company.

The parties proceeded with discovery and on November 12, 2021, defendant requested and obtained orthopedic QME panel 2770295. (Exhibit A.) From that panel, Dr. Alexis Dixon was selected as the panel QME and issued five reports dated March 15, 2022, January 20, 2023, September 8, 2023, October 4, 2023, and December 12, 2023. (Report, p. 2.)

Thereafter, it was determined that applicant also worked for co-defendant, Consolidated Staffing, during the cumulative injury period. (Report, pp. 1-2.) At the time, Consolidated Staffing was insured by United Wisconsin Insurance Company.

On September 22, 2022, Citistaff filed a petition to join Consolidated Staffing (Opinion on Decision (OOD), pp. 1-2.). The petition was denied by the WCJ. (*Id*.)

On October 24, 2022, a Notice of Representation was sent by Consolidated Staffing to Citistaff's counsel. (Exhibit 8.) On July 11, 2023, Consolidated Staffing filed a Declaration of Readiness to Proceed alleging that Citistaff failed to serve discovery upon them. (Exhibit 11.)

On January 8, 2024, applicant requested and obtained chiropractic QME panel 7653853 using the claim number provided by Consolidated Staffing. (Exhibit C.)

On June 25, 2024, a trial was held on the validity of the additional panel. The WCJ found this panel invalid and ordered cancellation of any QME evaluations.

To date, applicant has not made an election against any defendants.

DISCUSSION

I.

Preliminarily, former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 9, 2024, and 60 days from the date of transmission is December 8, 2024, which is a Sunday. The next business day that is 60 days from the date of transmission is Monday, December 9, 2024. This decision issued by or on December 9, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report, it was served on October 9, 2024, and the case was transmitted to the Appeals Board on October 9, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that

the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 9, 2024.

II.

We also find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration is taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order is defined as one that determines "any substantive right or liability of those involved in the case" or a "threshold" issue fundamental to a claim for benefits. (*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 [43Cal.Comp.Cases 661]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, at 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, and other similar 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 September 20, 2024 F&O addresses both threshold and interlocutory issues, but applicant's Petition only challenges the WCJ's decision regarding procurement of a QME panel, which is an interlocutory discovery issue. As such, we will consider applicant's Petition under the removal standard.

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 can show that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a). The petitioner must also demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Id.*) In the instant case, we are persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to applicant.

III.

Turning now to the Petition, section 4060 provides guidance as to the QME panel process in cases wherein compensability is denied, and applicant is represented. It provides, in pertinent 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.
>
> (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.
>
> (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.

Section 4060(c) avers that if an evaluation with a QME is necessary for determination of compensability, parties are to proceed as per section 4062.2, which provides, in pertinent part:

> (a) 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.

> (b) No earlier than the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060 or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. The party submitting the request shall designate the specialty of the medical evaluator, the specialty of the medical evaluator requested by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. The party submitting the request form shall serve a copy of the request form on the other party.

In the instant case, defendant Consolidated Staffing issued an October 11, 2022 letter to applicant denying compensability for the subject claim. (Exhibit C.) Thereafter, on January 8, 2024, applicant, using the same denial letter as evidence of a section 4060 compensability dispute, requested a chiropractic QME panel. (Ibid.) On the same date, applicant issued her strike and served a copy of the chiropractic QME panel upon Consolidated Staffing. (Ibid.) Based upon the evidence provided in the record, applicant properly followed QME panel procedure as per sections 4060 and 4062.2.

The WCJ contends that "there is no evidence present to justify another panel" as applicant "had the opportunity to obtain a chiropractic panel" with the first defendant, Citistaff, yet failed to do so. (Report, p. 4.) The WCJ further contends that applicant is unable to decline "election under Labor Code § 5500.5 in order to get additional panels" against every defendant. (Report, p. 3.)

Section 5500.5(c) provides, in pertinent part:

> In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect to proceed against any one or more of the employers. Where such an election is made, the employee must successfully prove his or her claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits.

Under section 5500.5(c), an "employee may obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability." (*Colonial Ins. Co. v. Industrial Acc. Com.* (*Pedroza*) (1946) 29 Cal.2d 79, 82 [11

Cal.Comp.Cases 226].) The employee, however, may also choose not to elect against any particular defendant and proceed against all insurers or employers individually. (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd*. (*Garcia*) (1997) 60 Cal.App.4th 548, 554-556 [62 Cal.Comp.Cases 1661].) Here, applicant has opted not to elect against either Citstaff or Conslidated Staffing and to proceed against both individually.

In non-election cases such as this, *Chanchavac* provides some guidance. In *Chanchavac*, the Workers' Compensation Appeals Board (WCAB) denied removal to an applicant who similarly opted not to elect. The WCAB found that in light of the applicant's decision not to elect, the second defendant, Sentry Insurance, was entitled to obtain its own panel QME in connection with the cumulative injury claim despite the fact that the first defendant, Twin City Fire Insurance Company, had already obtained one.

The WCJ contends that *Chanchavac* only provides *defendants* with the right to additional QME panels and applying *Chanchavac* to the current case would be an "expansion" that would create "bad policy," "unnecessarily" complicated litigation, and more costs, delays, and uncertainty. (Report, p. 3.) Given that applicant had "the choice of election," the WCJ believes it "fair to cut off" applicant's "additional discovery rights" as she already had "one bite at the apple" and "every right to participate in the first QME selection" whereas co-defendant Consolidated Staffing has had none. (*Id*.)

As established in *Garcia*, however, it is the employee's right to not elect against any defendant and to proceed against all insurers or employers individually. (*Garcia*, *supra*, at 554-556.) In proceeding against each individually, the process begins anew, which means each set of parties may proceed with the QME panel process as outlined under sections 4060 and 4062.2. In each instance, one party will necessarily be first in time in obtaining the QME panel despite both having the right to participate in the process. Unfortunately, in the case of Consolidated Staffing here, applicant was first in time. Further, notwithstanding the WCJ's opinions, there is nothing within *Chanchavac* which limits the right to additional panels to defendants only and there is no case or statutory law which supports the WCJ's finding that an employee may be denied due process rights simply because the employee chose not to elect against a defendant, particularly when it is within the employee's rights. Ultimately, election rules exist for the benefit and expediency of the injured worker and if an injured worker chooses nonelection, it is their every right, even if it means potential delays and complications. (*Rex Club v. Workers' Comp. Appeals*

Bd. (*Oakley-Clyburn*) (1997) 53 Cal. App. 4th 1465 [62 Cal. Rptr. 2d 393, 62 Cal. Comp. Cases 441].)

As a final point, we underscore the fact that applicant's Petition contains several exhibits previously submitted and easily located within the record. This is a violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945.) The duplication of these records is excessive and a waste of court resources. Applicant is therefore admonished to follow the Board's Rules of Practice and Procedure, including but not limited to WCAB Rule 10945, in all future matters.

Accordingly, we grant applicant's Petition and rescind and substitute the September 20, 2024 Findings and Order to reflect that chiropractic panel 7653853 is valid.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the September 20, 2024 Findings and Order is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 20, 2024 Findings and Order Award is **RESCINDED** and **SUBSTITUTED** with a new Findings and Award, as provided below.

FINDINGS OF FACT

1. Applicant, Alma Justo, born [] while employed during the period from February 15, 2019 through February 15, 2020 in West Covina and Orange, California, by Citistaff Solutions, Inc. and Consolidated Staffing Solutions, Inc., claims to have sustained injury arising out of and in the course of employment to the psyche, head, jaw, bilateral legs, and lumbar spine.

2. At the time of the claimed injury, the employers' workers compensation carriers were United Wisconsin Insurance Company, currently administered by Next Level Administrators, for Consolidated Staffing Solutions, Inc. and Old Republic Insurance Company, currently administered by Gallagher Bassett, for Citistaff Solutions, Inc.

3. No attorney's fees have been paid and no attorney fee arrangements have been made.

4. There was good cause for applicant to obtain the second panel (#7653853).

ORDER

1. Panel 7653853 is valid.
2. No attorney's fees are awarded.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 9, 2024

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

ALMA JUSTO
LAW OFFICES OF A. ALEXANDER SOLHI & ASSOCIATES
DJG LAW GROUP
SLATER &ASSOCIATES

RL/*cs*

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