WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ESTELA PELICO AJTUN, ***Applicant***

PARTNERS PERSONNEL MANAGEMENT SERVICES; STARR SPECIALITY INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ15289923
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION, DISMISSING PETITION FOR RECONSIDERATION, AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award and Order ("F&A") issued on October 2, 20214, wherein the workers' compensation administrative law judge ("WCJ") concluded that applicant had not sustained injury arising out of and in the course of employment ("AOE/COE") to her right upper extremity, left upper extremity, visual system and nervous system. Applicant argues that the WCJ erred by failing to order further development of the record, because QME exams in the specialties of neurology and ophthalmology have not been conducted in the case.

Defendant also seeks reconsideration of the F&A, arguing that the WCJ erred in awarding only $661.16 in credit for overpayment of temporary disability ("TD"); it argues it is instead entitled to a total credit of $7,425.35 against the permanent disability ("PD") award in the case.

We did not receive an answer to either petition. We did receive two Reports and Recommendations on Petition for Reconsideration from the WCJ, one pertaining to each petition, recommending that both petitions be denied.

We have reviewed the Petitions, the Reports, and the record. For the reasons discussed below, we will grant applicant's Petition, rescind the F&A, and substitute a new order finding that further development of the record is required with regard to applicant's neurological and ophthalmologic complaints, with other issues deferred pending that development. We will dismiss

defendant's Petition as moot given our decision to defer the other issues pending such development.

FACTUAL BACKGROUND

Applicant filed an Application for Adjudication, alleging a specific injury to multiple body parts sustained on July 24, 2021 while employed by defendant as a laborer. Defendant does not contest that applicant suffered compensable injuries to her lumbar spine, thoracic spine, cervical spine and left side scalp. Defendant does contest the claim with respect to applicant's arms, nervous system, and visual system.

The parties appear to agree that applicant injured herself by falling and hitting her head while on the employer's premises. She received treatment immediately after the injury, before ultimately continuing treatment with Keolanui Chun, M.D., from October 2021.[1] Broadly summarized, Dr. Chun found applicant's subjective complaints in excess of the objective findings. (See D. Exs. A–H.)

Applicant also underwent a Panel Qualified Medical Evaluation (PQME) with Michael Mauro, M.D., on April 19, 2022, an orthopedic specialist. In contrast to Dr. Chun, Dr. Mauro largely found applicant's complaints to be credible. (See J. Exs. AA-CC.) The doctors also disagree as to when applicant reached maximum medical improvement ("MMI"), among other matters.

Dr. Mauro repeatedly recommended that applicant be evaluated by a neurologist and ophthalmologist for her head pain and eye pain, as these complaints were outside his area of expertise. (J. Ex. AA, at p.3; J. Ex. BB, at p. 3; J. Ex. CC, at p. 30.) Despite Dr. Mauro's recommendation, the parties were unable to agree on obtaining further PQME reports.

On March 28, 2023, defendant filed a declaration of readiness to proceed ("DOR"), seeking a mandatory settlement conference ("MSC"). Applicant filed an objection, noting that discovery was ongoing and that defendant had not responded to attempts to set up PQME evaluations in neurology and ophthalmology, as advised by Dr. Mauro.

At the May 16, 2023 hearing, the WCJ took the matter off calendar over defendant's objection, noting: "Timely objection to DOR filed stating good cause. Discussion with the parties

[1] The facts of applicant's treatment history are abbreviated and presented only to the extent they are relevant to the claims raised in the petitions.

revealed that ortho PQME also recomm neurology and ophthalmology evaluations as recently as 2023." (Minutes of Hearing, 5/16/2023, at p. 1.)

According to applicant's Petition – verified under penalty of perjury and uncontradicted by defendant – rather than agreeing to the PQME evaluations in question, defendant instead scheduled applicant to be seen by secondary consults in neurology and ophthalmology. These doctors – neurologist Bijan Zardouz, M.D. and ophthalmologist Wayne Martin, M.D. – conducted examinations and prepared reports in October and November of 2023. (See D. Exs. I, J.) Neither doctor opined on causation or degree of disability. (See. D. Ex. I, at p. 4; D. Ex. J, at p. 2.)

On January 5, 2024, defendant filed another DOR, seeking another MSC. In the section regarding good faith efforts to resolve the dispute, defendant wrote: "SEE LANGUAGE IN ATATCHED [*sic*] SIGNED COMPROMISE AND RELEASE." No such Compromise and Release was attached, and according to applicant's Petition, no such settlement ever existed. (Applicant's Petition, at p. 4.) Applicant did not file an objection. According to applicant's Petition, this failure to object was because "it appeared defendant wanted to discuss and finalize settlement, not set the case for trial, considering that Defendants knew the medical record still needed to be developed." (*Ibid.*)

At the February 28, 2024 MSC, defendant sought to set the matter for trial. Applicant requested the matter go off calendar again due to the failure to obtain PQME reports in neurology and ophthalmology, but the WCJ presiding over the hearing denied the request and set the matter for trial, noting: "No objection to DOR. AA contends that med evid currently does not constitute substantial med evid and that IW denies being eval'd by ophthalmologist but report issued. Defer to trial judge." (Minutes of Hearing, February 28, 2024, at p. 2.)

The matter ultimately proceeded to trial on May 9, 2024. According to the Minutes of Hearing, the issues listed were: (1) parts of body injured; (2) liability for TD for the period of July 24, 2021 through March 9, 2023; (3) the permanent and stationary ("P&S") date; (4) PD and apportionment; (5) need for further medical treatment; (6) the lien of prior applicant's counsel, which was deferred; (7) attorney's fees, (8) applicant's contention that further development of the record was required with regard to the neurological and visual system; and (9) TTD overpayment in the amount of $661.18. (MOH/SOE, 5/9/2024, at pp. 2–3.) Exhibits were admitted, applicant testified, and the matter was taken under submission.

On September 5, 2024, the WCJ issued his first Findings, Award and Order ("First F&A"), finding in relevant part that applicant did not sustain injury AOE/COE to the disputed body parts, including applicant's nervous system and visual system. (First F&A, at p. 1, ¶ 2.) The appended Opinion on Decision makes clear that the WCJ did not find applicant's testimony credible. (Opinion on Decision, at pp. 7–9.) The Opinion on Decision also makes clear that the WCJ believed that further development of the record was not warranted, because applicant's failure to object to the January 5, 2024 DOR in effect waived any objection to proceeding without PQME reports in neurology and ophthalmology. (*Id.* at pp. 15–17.) The First F&A includes no finding in relation to defendant's claim of TD overpayment.

Both parties filed petitions for reconsideration – applicant contesting the WCJ's decision not to further develop the record, and defendant contesting the WCJ's failure to rule on the TD overpayment issue and further arguing that in fact based upon the WCJ's determination, the TD overpayment should be for $7,425.35. On October 1, 2024, the WCJ rescinded the First F&A.

The WCJ issued the instant F&A the next day, on October 2, 2024. The F&A essentially restates the findings and conclusions of the first F&A, but includes a finding that defendant is entitled to a credit for TD overpayment in the amount of $661.18, the amount originally claimed by defendant. (See F&A, at p. 2, ¶ 9.)

The instant Petitions for Reconsideration followed.

DISCUSSION

I.

Former Labor Code 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, Labor Code 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 Labor Code 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 in Events 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 first transmitted to the Appeals Board on October 17, 2024 and 60 days from the date of transmission is December 16, 2024. This decision is issued by December 16, 2024, so that we have timely acted on the petitions as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 first Report and Recommendation by the WCJ, the first Report was served on October 17, 2024, and according to the proof of service for the second Report and Recommendation, the second Report was served on October 31, 2024. Service of the Reports and transmission of the case to the Appeals Board occurred on the same day in each instance. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Reports in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day periods on October 17, 2024 and October 31, 2024.

II.

We first address applicant's petition, because if we agree with applicant that further development of the record is necessary with regard to applicant's neurological and ophthalmologic

complaints, applicant's dates of TD may change, and any question of overpayment of TD must therefore wait until such development of the record has been completed.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) However, if a party fails to meet its burden of proof by obtaining and introducing competent evidence, it is not the job of the Appeals Board to rescue that party by ordering the record to be developed. (Lab. Code, § 5502; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].) The duty to develop the record must be balanced with the parties' obligation to exercise due diligence to complete necessary discovery. (*San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan), supra*.)

Labor Code section 4061, subdivision (i) states in relevant part: "No issue relating to a dispute over the existence or extent of permanent disability impairment and limitations resulting from the injury may be subject to a DOR unless there has been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator."

WCAB Rule 10744, subdivision (d) states: "If a party has received a copy of the Declaration of Readiness to Proceed and has not filed an objection under this rule, that party shall be deemed to have waived any and all objections to proceeding on the issues specified in the declaration, absent extraordinary circumstances." (Cal. Code Regs., tit. 8, § 10744(d).)

Here, we disagree with the WCJ that applicant failed to exercise due diligence to complete necessary discovery. The record shows that applicant repeatedly sought PQME evaluations pursuant to Dr. Mauro's recommendation, including as recently as May 2023, when a WCJ took the matter off calendar for the purpose of obtaining further medical evidence. According to applicant's Petition, rather than obtaining PQME evaluations immediately, defendant instead wanted to schedule consulting examinations with a neurologist and ophthalmologist first, which it did, obtaining reports in October and November of 2023. Also according to applicant's Petition, defendant served applicant's attorney with the reports on January 2, 2024, only a few days before the January 5, 2024 declaration of readiness. (Applicant's Petition, at pp. 7, 9.)

Although applicant's attorney could have been more proactive about seeking WCAB intervention when it became clear that defendant was still unwilling to obtain PQME reports even after the matter was taken off calendar in May 2023, taking the uncontested representations of applicant's Petition at face value, we do not think the record can be fairly characterized as showing a lack of due diligence on applicant's attorney's part. Applicant's attorney apparently believed that the parties would wait for the receipt of the reports from Drs. Zardouz and Martin before deciding on whether to proceed with PQME reports, and essentially no time elapsed between applicant's attorney receiving those reports and defendant filing the January 5, 2024 DOR.

That DOR – both its filing and applicant's attorney's failure to object – is the most vexing element in this case. The DOR itself is obviously and clearly defective on its face, because it purports to attach a Compromise and Release which was not only not attached, but apparently never existed.[2] The record does not appear to contain any explanation for how or why defendant proceeded in such a manner. Confronted with such a filing, it is somewhat understandable that applicant's attorney would not have immediately perceived that defendant was attempting to set the case for trial based upon the existing medical record. At a bare minimum, defendant's conduct shows a lack of care and diligence on its part in the filing of the DOR, especially considering that the relevant section of the DOR is stated under penalty of perjury. At worst, it could show intent to obfuscate its true aim. However, because we have no evidence to suggest that defendant did intend to engage in such bad-faith behavior, we will assume for purposes of decision that defendant's actions were motivated not by malice, but by inattention.

By the same token, applicant's attorney's inaction also leaves something to be desired. Upon receiving the DOR, applicant's attorney should have filed an objection – or, at a bare minimum, immediately contacted defendant's attorney to ascertain what defendant's motive in filing the DOR actually was. Applicant's petition instead states that applicant's attorney "did not object to the DOR as it appeared defendant wanted to discuss and finalize settlement, not set the case for trial[.]" (Applicant's Petition, at p. 4.) As this case illustrates, it is dangerous for litigation to operate upon assumptions, and applicant's attorney ought to have known better than to simply assume that defendant's intent was not to go to trial.

[2] It also arguably violates Labor Code section 4061, subdivision (i)'s prohibition on filing a DOR where PD is disputed and there is no PQME or AME Report – although technically speaking there is a PQME report in this case, that report specifically notes that its preparer was unable to properly evaluate applicant's neurological and ophthalmologic complaints.

The upshot is that we are left with a rather novel situation to adjudicate – a facially defective DOR with an unclear objective, paired with a corresponding failure by the opposing party to either timely object or clarify the other party's intentions. Although we understand the WCJ's frustration at applicant's failure to object and the corresponding conclusion that this failure waived any objection pursuant to WCAB Rule 10744, subdivision (d), on balance we believe that these are precisely the sort of "extraordinary circumstances" that the Rule contemplates, and carves out an exception for. It is not clear to us why applicant should bear the burden of what are evidently mutual mistakes and inattention in conjunction with the filing of the DOR. To endorse the conclusion that applicant waived the right to obtain PQME reports by failure to object would in effect reward defendant for filing a defective DOR that obscured its true intentions.

Accordingly, we believe that the best course of action here is to rescind the F&A and substitute a new order finding that development of the record is required with regard to applicant's neurological and ophthalmologic complaints, with other issues deferred pending such development. Upon completion of development of the record, the WCJ will be in a position to reconsider those other issues with the benefit of a complete and adequate record, and therefore to issue a decision supported by substantial evidence that accords due process to both parties. We trust that the parties, having already wasted substantial time and judicial resources through inattention and poor communication, will work together diligently and collaboratively from this point on to avoid further delay or confusion.

In light of the above resolution of applicant's petition, we will dismiss defendant's petition as moot. Applicant's period of TD may fluctuate as a result of the development of the record we have ordered, and so any TD overpayment may necessarily fluctuate as well, and it would therefore be premature to consider the issue at this time.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the October 2, 2024 Findings, Award and Order is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that defendant's Petition for Reconsideration of the October 2, 2024 Findings, Award and Order is **DISMISSED** as moot.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 17, 2024 Findings & Order is **RESCINDED,** and the following order **SUBSTITUTED:**

FINDINGS OF FACT

1. **Estela Pelico Ajtun, while employed on July 24, 2021 as a laborer, Occupational Group Number 360, at Garden Grove, California by Partners Personnel Management Services, insured by Starr Specialty Insurance Company, sustained injury arising out of and in the course of employment to her lumbar spine, thoracic spine, cervical spine, and left side of scalp.**
2. **Applicant's earnings at the time of injury were $534.02 per week producing a temporary disability rate of $356.01 per week, and a permanent disability rate of $290.00 per week.**
3. **Further development of the record is required with regard to applicant's neurological and ophthalmologic complaints.**
4. **All other issues are deferred.**

ORDER

IT IS ORDERED THAT the parties shall further develop the record with regard to applicant's neurological and ophthalmologic complaints.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 13, 2024

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

ESTELA PELICO AJTUN
JENG & ASSOCIATES
SAMUELSON GONZALEZ

AW/*pm*

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