WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GRACIELA NUNEZ, *Applicant*

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, permissibly self-insured, administered by, SEDGWICK CLAIMS MANAGEMENT SERVICES *Defendants*

Adjudication Numbers: ADJ13276965; ADJ14016357
San Bernardino District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration and/or removal of the "Order Vacating Submission, Ordering Development of the Record and Ordering the Case Off Calendar" (Order) issued on April 23, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ vacated submission in ADJ13276965 and ordered the matter off calendar; and ordered that the parties return to the qualified medical evaluator (QME) to address the newly filed claim for cumulative injury (ADJ14016357).

Defendant contends, in pertinent part, that the WCJ exceeded his discretion by ordering development of the record.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal and/or Reconsideration (Report) recommending that we deny removal and reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the WCJ's April 23, 2021 Order and

[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

return the matter to the WCJ for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

FACTS

The WCJ's Report accurately recites the facts of this matter as follows:

> Applicant filed a claim alleging a specific date of injury of April 16, 2018. Applicant was evaluated by Dr. Miller in the capacity of a PQME.
>
> A Mandatory Settlement Conference (MSC) was held on October 22, 2020. The matter was set for trial to be held on December 20, 2020. The Minutes of Hearing (MOH) also provide all discovery is to be closed with the exception of the deposition of the PQME which had been previously set for December 16, 2020.
>
> At the December 20, 2020 trial date, the parties had failed to file a jointly completed Pre-trial Conference Statement and additionally, the medical reports were not separately filed in EAMS. Mindful of my duties pursuant to *Hamilton*, the trial was continued to February 2, 2021 for the parties to complete same.
>
> Following the deposition, Applicant filed an Application for Adjudication of Claim alleging a cumulative trauma type injury for the period April 16, 2018 through September 1, 2020 under ADJ14016357.
>
> After submission of the specific injury claim for decision, the WCJ issued an order vacating submission and ordered the parties back to the PQME for development of the record as to the continuous trauma filed by Applicant.
>
> It is from that order that defendant seeks reconsideration/removal.

(Report and Recommendation on Petition for Removal and/or Reconsideration, June 3, 2021, p. 2.)

DISCUSSION

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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. (*Maranian v.*

Workers' Comp. Appeals Bd. (2000) 81 CalApp.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 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, or similar issues.

Here, the WCJ's decision solely resolves an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision and here, the petition for reconsideration was subject to dismissal.

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].) The Appeals Board 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.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).)

For the reasons stated in the WCJ's Report, we concur with his decision to order further development of the record. However, based on our review, it may not be appropriate to order the parties to return to the prior QME to address the new claim of cumulative injury.

In *Navarro v. City of Montebello* (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc), the Appeals Board held en banc that the "Labor Code does not require an employee to return to the same panel QME for an evaluation of a subsequent claim of injury." (*Navarro*, *supra*, 79 Cal. Comp. Cases at p. 420.)

> Considering section 4062.3(j) and section 4064(a) together, both sections state that a medical evaluation shall address "all medical issues arising from all injuries reported on one or more claim forms." Both sections refer to an injury reported on a claim form as the operative act, and not to a date of injury, a report of injury other than on a claim form, or the filing of an application with the WCAB. Under section 5401, an employer must provide a claim form and an injured worker must file a claim form with an employer. Hence, the reported date under sections 4062.3(j) and 4064(a) must be the filing date as defined by section 5401 because only section 5401 refers to filing a claim form. Because the date the claim form is filed with employer is the operative act, the date of filing of the claim form determines which evaluator must consider which injury claim(s).

(*Navarro*, *supra*, 79 Cal. Comp. Cases at pp. 423-424, emphasis in original for "with"; emphasis added to last sentence.)

The *Navarro* decision also held that the requirement in AD Rule 35.5(e) "that an employee return to the same evaluator when a new injury or illness is claimed involving the same parties and the same type of body parts is inconsistent with the Labor Code, and therefore, this requirement is invalid." (*Id*. at p. 426.)

> While parties are not precluded from agreeing to return to the same evaluator for subsequent claims of injury, based on the foregoing, we conclude that an employee may be evaluated by a new evaluator for each injury or injuries reported on a claim form after an evaluation has taken place. Thus, regardless of whether a subsequent claim of injury is filed with the same employer or a different employer and regardless of whether injury is claimed to the same body parts or to different body parts, when a subsequent claim of injury is filed, the Labor Code allows the employee and/or the employer to request a new evaluator. In keeping with the limitations set forth in sections 4062.3(j) and 4064(a), at the time of an evaluation the evaluator shall consider all issues arising out of any claims that were reported before the evaluation, and if several subsequent claims of injury are filed before the evaluation by the new evaluator takes place, that one new evaluator shall consider all of those claims of injury.

(*Id*. at p. 425, emphasis added.)

Thus, pursuant to *Navarro*, the proper discovery procedure for applicant's subsequently filed cumulative injury claim is for the parties to agree to an agreed medical evaluator (AME) or agree to return to the QME who previously reported, but absent an agreement, either party may obtain a new panel.

Here, it is unclear whether the parties have agreed to return to the previous QME to address the newly filed claim of cumulative injury. Specifically, it is unclear from applicant's Answer

whether applicant agrees that further discovery is appropriate in ADJ13276965 (the specific injury claim) or whether applicant has consented to return to the previous QME for an evaluation in ADJ14016357 (the newly filed cumulative injury claim).

Upon return, the WCJ must parse out whether either party is exercising their right to an evaluation by a different QME in the cumulative injury claim, as set forth in *Navarro, supra*. If the issue in ADJ13276965 (the specific injury claim) is further development of the record for reporting by the existing QME on the merits of the specific injury claim, it must be clearly articulated. Lastly, upon return, the WCJ may consider whether the cases should be consolidated.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's April 23, 2021 Order and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order issued on April 23, 2021, is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2024

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

GRACIELA NUNEZ
LAW OFFICES OF SCOTT SCHWARTZ
TOBIN LUCKS

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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. o.o