WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARI LUZ HALE, *Applicant*

vs.

SUPER STORES INDUSTRIES; THE NORTH RIVER INSURANCE COMPANY, administered by CRUM AND FORSTER, *Defendants*

Adjudication Number: ADJ11387739
Lodi District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant North River Insurance Company, administered by Crum & Firster (defendant) seeks reconsideration of the June 17, 2024 Findings of Fact, Award and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an accountant from April 3, 2001 to April 3, 2017, sustained industrial injury to her bilateral wrists, elbow[s], and in the form of thoracic outlet syndrome. The WCJ found that the reporting and testimony of the Qualified Medical Evaluator (QME) was not substantial evidence and appointed a regular physician pursuant to Labor Code[1] section 5701.

Defendant contends that QME's opinions should have been weighed and relied upon regarding all issues and, not just accepted for some medical issues but set aside for others, and that the reporting of the QME is substantial medical evidence.

We have received an Answer from applicant. 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, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will treat the petition as one seeking reconsideration and deny the petition.

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

FACTS

Applicant sustained injury to her bilateral wrists, elbows, and in the form of thoracic outlet syndrome while employed as an accountant by defendant Super Stores Industries from April 3, 2001 to April 3, 2017.

The parties have selected F. Karl Gregorius, M.D., as the QME in neurosurgery.

On April 24, 2024, the parties proceeded to trial. The parties stipulated therein to applicant's injury as having arisen out of and in the course of employment, and to injury to the bilateral wrists, elbows, and in the form of thoracic outlet syndrome. (Minutes of Hearing (Minutes), dated April 24, 2024, at p. 2:8.) The parties further stipulated, in relevant part, to the scheduled rating of the reporting of QME Dr. Gregorius, and to applicant's entitlement to future medical care to the bilateral wrists, elbow, and for applicant's thoracic [outlet] syndrome. (*Id.* at p. 2:38.) The sole issue framed by the parties was the "applicable apportionment" of QME Dr. Gregorius. The WCJ provided the parties with additional time in which to file trial briefs, and ordered the matter submitted for decision on May 22, 2024.

On June 17, 2024, the WCJ issued the F&O, ordering in relevant part the appointment of Jonathan Rutchik, M.D., as a regular physician pursuant to Labor Code section 5701. The WCJ's Opinion on Decision notes that while the WCJ found the opinions of QME Dr. Gregorius to be well-reasoned, the QME stated in his deposition testimony that he was not an expert, and that the QME's reports and testimony did not rise to the level of substantial evidence. The WCJ concluded that, "[b]ased on the research of this WCJ, Dr. Rutchik appears to have expertise in the area of thoracic outlet syndrome and will be able to provide this court with an opinion regarding apportionment so as to allow the court to base a decision upon that report." (F&O, Opinion on Decision, p. 3.)

Defendant's Petition avers the WCJ erred in relying on the reporting of Dr. Gregorius to establish causation of the injury and the extent of permanent disability and need for future medical care, but then discounting the reporting based on the alleged inconsistencies in the apportionment analysis. (Petition, at p. 4.) Defendant further notes that the QME did not waive his status as medical expert but rather testified that questions as to the mechanism of injury for the alleged thoracic outlet syndrome could be directed to a physical therapist, and that the QME's opinions were based upon his knowledge, training and expertise. Accordingly, defendant contends the

reporting of Dr. Gregorius is substantial evidence that supports apportionment of 50 percent to preexisting factors.

Applicant's Answer responds that the WCJ was within his powers to find the QME's Opinion on apportionment did not rise to the level of substantial medical evidence, and that the WCJ's conclusions are supported in the evidentiary record.

DISCUSSION

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.
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> (b)
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> (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.
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> (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 transmitted to the Appeals Board on July 12, 2024, and the next business day that is 60 days from the date of transmission is September 10, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on September 10, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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 Report and Recommendation by the workers' compensation administrative law judge, the Report was served on July 12, 2024, and the case was transmitted to the Appeals Board on July 12, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 12, 2024.

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 Cal.App.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.

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 WCJ's decision includes findings of employment, injury, and need for future medical care. These are final orders subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].)

Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding/order determining the issue of whether the apportionment analysis of the QME constitutes substantial evidence, and the related appointment of a regular physician. Therefore, we will apply the removal standard to our review. (See *Gaona, supra,* 5 Cal.App.5th 658, 662.)

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, defendant contends it was incongruent for the WCJ to rely on some aspects of the reporting of QME Dr. Gregorius, but to also reject other aspects of the reporting, notably the QME's apportionment analysis. Defendant's Petition contends, "[i]f the medical opinion of Dr. Gregorius are so unreliable based upon this singularly considered factor, then that reasoning would necessarily need to apply to all of Dr. Gregorius's medical opinions in which case, defendant contends that all of the other findings of fact found by parties WCJ would also not be supported by the medical evidence." (Petition, at p. 5:16.) Regarding the sufficiency of the apportionment analysis, defendant observes that the QME has testified that, "50% of [applicant's] final disability to the pre-existing condition of rounded shoulders and poor posture, which was present in 2006 as well as now…." (Petition, at p. 8:11, citing Ex. HH, Transcript of the Deposition of Karl Gregorius, M.D., dated July 3, 2023, at pp.50-51].) In addition, defendant contends that despite the QME's testimony that he is not an expert in the mechanism of thoracic outlet syndrome, the QME never

relinquished his status as expert physician witness with respect to "applicant's thoracic outlet syndrome and orthopedic claim of injury." (*Id.* at p. 9:18.) Accordingly, the Petition avers error in not relying on the conclusions of QME Dr. Gregorius, including his assessment of 50 percent apportionment of permanent disability to preexisting factors.

The WCJ's report characterizes defendant's petition as proceeding from the incorrect premise that the WCJ relied upon the opinion of the QME to arrive at his findings of permanent disability:

> This WCJ did not make any decisions nor offer any opinions on the issues of causation, PD nor medical treatment as the parties stipulated to all of those issues. The only issue the court was asked to address was apportionment. On that issue, Dr. Gregorius was at best, inconsistent.
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> More specifically, Dr. Gregorius does not even mention apportionment in his first three reports (Joint AA-Joint CC.) In his fourth report (Joint DD) he opines that the entire award should be apportioned to her cumulative trauma claim. (See page 6 of Joint DD). Thereafter, during his deposition on 3/1/21, Dr. Gregorius changed his opinion on apportionment to 50% pre-existing. (Joint HH pgs. 49-52) This change was apparently based upon review of records indicating that applicant had similar symptoms dating back to at least 2006 and possibly beyond. While interesting, the relevance of that factor seems to dull when one realizes that this applicant has worked the same job with the same duties and thus same industrial exposures since at least 2001.
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> In addition, during his deposition, Dr. Gregorius repeatedly indicated his was not an "expert" in the mechanics of Thoracic Outlet Syndrome (TOS) and indicated that physical therapists and proper treating physicians should be deferred to. One of those physicians was Dr. Newkirk. In his report dated 4/25/21 (Applicant's Exhibit 1) Dr. Newkirk opined that the TOS was 100% industrially related.
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> Labor Code Section 5701 empowers the appeals board to appoint regular physicians from time to time. This type of case seems to be exactly what was contemplated by the legislature when enacting this code section. It should be noted that the parties submitted the issue of apportionment and ONLY the issue of apportionment for decision. They asked the appeals board to decide apportionment as described by Dr. Gregorius in his reports and deposition. As previously indicated, this WCJ did not find Dr. Gregorius' opinions on apportionment to be "substantial." The substantiality of evidence is always in issue. (See *Serafin* 13 CCC 267) Thus in an effort to achieve substantial justice, the decision was made to appoint a regular physician in the person of Dr. Rutchik who appears to have a great degree of expertise in Thoracic Outlet Syndrome.

(Report, at pp. 3-4.)

We concur with the WCJ's analysis. The parties have stipulated to both injury and the need for future medical treatment to the injured body parts/systems. (Minutes, at p. 2:8; 2:38.) The sole issue submitted to the WCJ for decision was the apportionment analysis of Dr. Gregorius. (*Id.* at p. 2:44.)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (*Escobedo*) (Appeals Bd. en banc), we held that "to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Id.* at p. 621.) We further noted that the apportionment opinion of the evaluating physician must address "how" and "why" nonindustrial and prior industrial factors are presently causing permanent disability. (*Id.* at p. 622; see also *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].)

Here, the WCJ has carefully reviewed and evaluated the apportionment analysis as described by the QME in response to the sole issue raised by the parties at trial. Having considered the question of the weight of the evidence in light of the applicable statutory and case law authority, the WCJ has determined that the existing apportionment analysis described by the QME does not constitute substantial evidence. Accordingly, the WCJ has issued an interlocutory order for development of the record with a regular physician pursuant to section 5701.

We discern no error in the WCJ's weighing of the evidence. Moreover, we accord to the WCJ wide latitude in the determination of discovery disputes at the trial level. (Cal. Code Regs., tit. 8, § 10955(a); *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624]; *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406].)

Accordingly, we are not persuaded that defendant's petition establishes irreparable harm as a result of the WCJ's interim order for development of the record. We will deny the petition, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 10, 2024

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

MARI LUZ HALE
LAW OFFICE OF GARY C. NELSON
LAW OFFICES OF DANIEL K. LEE

SAR/*cs*

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