WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NOVELLA NOBLE, *Applicant*

vs.

ASCENA RETAIL GROUP, INC.; SAFETY NATIONAL CASUALTY CORP., administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ13490319
Riverside 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.

Applicant sought reconsideration of the Findings and Award (F&A) issued on October 4, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was not entitled to an evaluation by an additional qualified medical evaluator (QME).

Applicant contends, in pertinent part, that the WCJ erred because the WCJ failed to follow the Appeals Board's en banc opinion in *Navarro v. City of Montebello* (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc).

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

We have considered the allegations of the Petition for Reconsideration and 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 October 4, 2022 F&A and substitute a new Finding and Order that applicant is entitled to a new QME. All other issues, including the potential issues of costs and/or sanctions, are deferred.

FACTS

On October 11, 2021, we granted reconsideration in this matter on substantially similar facts:

> Applicant initially filed a DWC-1 claim form dated March 6, 2018 with the date of injury stated as "CT: 10/03/17-11/2/17" to the "right knee, RLE." (Joint Exhibit No. 6, DWC-1 Claim Form, March 6, 2018.) An Application for Adjudication of Claim was filed by applicant's attorney for this claim on March 13, 2018. (Joint Exhibit No. 5, Application for Adjudication of Claim, March 13, 2018.) The claim was assigned case number ADJ11233436.
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> An orthopedic QME panel was obtained to address ADJ11233436. (Joint Exhibit No. 9, Panel List by the DWC, June 11, 2018.) G. Sunny Uppal, M.D. was the resulting QME from this panel and evaluated applicant in 2018. (Joint Exhibit No. 1, QME Report by Sunny Uppal, M.D., August 6, 2018.) Dr. Uppal opined that applicant's right knee condition resulted from a specific injury on October 3, 2017 and "did not report any complaints or history consistent with a cumulative trauma injury." (Joint Exhibit No. 3, QME Report by Sunny Uppal, M.D., October 2, 2018, p. 4.) Dr. Uppal attributed causation for applicant's right knee condition to the October 3, 2017 specific injury. (Joint Exhibit No. 2, QME Report by Sunny Uppal, M.D., August 13, 2019, p. 2.)
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> Case number ADJ11233436 was scheduled for trial on August 13, 2020. The Minutes for the trial date state in handwriting in the comments: "With waiver of LC § 5313 and discussing the case with the attorneys and in the presence of applicant, applicant agrees to dismiss this case with prejudice. Based on the foregoing, this case is hereby dismissed with prejudice." (Minutes of Hearing, August 13, 2020.)
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> Also on August 13, 2020, applicant filed a new Application for Adjudication of Claim alleging a specific injury on October 3, 2017 to the right knee and other body parts. (Joint Exhibit No. 13, Application for Adjudication of Claim, August 13, 2020.) A DWC-1 claim form dated August 13, 2020 for this injury was filed with the Application.[1] This claim was assigned ADJ13490319 and has apparently been denied by defendant.
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> A QME panel was issued in pain medicine for the specific injury claim on September 14, 2020 at applicant's attorney's request. (Joint Exhibit No. 8, Panel List by the DWC, September 14, 2020.)

[1] The 2020 DWC-1 claim form was not part of the evidence admitted into the record at trial. We take judicial notice of this claim form in the Electronic Adjudication Management System (EAMS). (See *Faulkner v. Workers' Comp. Appeals Bd*. (2004) 69 Cal.Comp.Cases 1161 (writ den.) [the Court of Appeal found that the WCAB may take judicial notice of the DWC-1 claim form even if it has not been admitted into evidence].)

The matter proceeded to trial on June 23, 2021 on the following issues:

1. Whether applicant's claim of injury is barred by statute and case law, including Labor Code Section 5303 Anti-Merger.

2. Statute of Limitations and untimely notice in filing as alleged per Labor Code Section 5412.

3. In the event that applicant's claim is not barred, whether applicant improperly obtained a QME panel.

(Minutes of Hearing and Summary of Evidence, June 23, 2021, p. 2.)

> The WCJ issued the Findings wherein he found that the claim is not barred by the statute of limitations and Labor Code section 5412, the claim is not barred by section 5303 and the anti-merger statutes, and applicant is not entitled to a second QME panel.

(Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Decision), October 11, 2021, pp. 2-3.)

We rescinded the WCJ's order that applicant was not entitled to a QME and ordered development of the record. (*Id*. at p. 6.) We noted: "Dismissing the cumulative trauma claim while simultaneously filing a new claim form for the specific injury and requesting a new QME panel does not have an aboveboard appearance to it, though we are not prepared to conclude that it rises to the level of bad faith." (*Ibid*.) Thereafter, it appears that the matter was resubmitted on substantially the same record as before.

DISCUSSION

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.)

Whether a party is “doctor shopping” does not factor into the analysis of whether a panel QME is allowed under *Navarro*.

> We are aware that in a particular case it may be beneficial to one side to seek a new evaluator and that unfortunately, a subsequent claim of injury could be filed by an employee or an employer with the goal of “doctor-shopping,” potentially leading to increased medical-legal costs and delays. However, since these provisions of the Labor Code apply equally to both employees and employers, we do not see that either side gains an overall advantage.

(*Id*. at p. 428.)

Under the principles outlined in *Navarro*, both parties are clearly entitled to a new QME evaluation in applicant's claim of subsequent injury. There may be cases where the filing of a subsequent claim could constitute frivolous and/or bad faith conduct; however, even in such cases the question is not whether a QME panel should issue, but instead whether a party and/or their attorney is liable for sanctions under Labor Code section 5813, including as appropriate, the costs of the evaluation.

As we noted in our prior decision, there is an appearance of impropriety in applicant attorney's conduct in this matter. However, appearances alone are insufficient to find bad faith. A decision "must be based on admitted evidence in the record[.]" (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc).) No testimony was taken from applicant or applicant's attorney. No credibility determinations were made. No contemporaneous documents were offered as evidence establishing a course of conduct. Thus, the record is presently insufficient to consider whether applicant's attorney's acted in bad faith.

However, as we are sending this back for further development of the record and to permit applicant to proceed with a different QME evaluation, we note that further development is also permitted on the issue of costs and/or sanctions. Prior to proceeding with a QME evaluation, we encourage the parties to meet and confer to discuss the possibility of settlement.

Accordingly, as our Decision After Reconsideration we will rescind the October 4, 2022 F&A and substitute a new Finding and Order that applicant is entitled to a new QME. All other issues, including the potential issues of costs and/or sanctions, are deferred.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on October 4, 2022, is **RESCINDED** with the following Findings of Fact and Order **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant is not required to return to panel QME Dr. Uppal in this case and is entitled to a QME evaluation.

2. All other issues, including the issues of costs and/or sanctions, are deferred.

ORDERS

IT IS ORDERED THAT applicant's request to proceed with a panel qualified medical evaluator is **GRANTED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 6, 2024

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

NOVELLA NOBLE
SHATFORD LAW
ALBERT AND MACKENZIE

EDL/oo

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