WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANTONINA SALAMAT, *Applicant*

vs.

SBM SITE SERVICES, and SAFETY NATIONAL CASUALTY CORPORATION, administered by CANNON COCHRAN MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Numbers: ADJ19203396; ADJ19457849
San Jose District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal of the November 1, 2024 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found in relevant part that applicant, while employed by defendant as a customer service rep, sustained an August 29, 2023 (ADJ19457849) injury arising out of and arising in the course of employment (AOE/COE) to the left wrist and left knee and claims to have sustained injury to various other body parts; and that during period from January 1, 2020 through February 15, 2024 (ADJ19203396), sustained injury AOE/COE to the face, neck, upper extremities, back, and lower extremities. The WCJ also found defendant's orthopedic panel 7705125 to be valid and applicant's chiropractic panel 7694889 to be invalid.

Applicant contends that both claims had already been filed at the time of applicant's request for a chiropractic panel. As such, under *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Board en banc), applicant's usage of the claim number for specific injury, rather than the cumulative injury, was irrelevant given that the same panel Qualified Medical Evaluator (QME) was to evaluate both injuries. (Petition, p. 3.) Applicant further contends that pursuant to

Labor Code section 4060(c)[1] and *Brar (Binu) v. County of Fresno* (2021) 86 Cal.Comp.Cases 430, applicant need not wait for the issuance of a formal denial in order to request a QME panel.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

Upon issuance of the Report, applicant submitted and requested permission for acceptance of a supplemental petition. We accept the supplemental petition. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the Petition for Removal (Petition), the Answer, the supplemental petition, and 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, grant reconsideration, rescind the November 1, 2024 F&O, and substitute a new F&O which finds applicant's panel to be valid and defendant's panel to be invalid.

FACTS

Applicant claimed that while employed by defendant as a customer service representative, she sustained a specific injury on August 29, 2023 (ADJ19457849) to the left wrist and left knee and various other body parts, as well as a cumulative injury from January 1, 2020 through February 15, 2024 (ADJ19203396), to the face, neck, upper extremities, lower extremities and back.

In a letter to applicant dated January 22, 2024, defendant accepted the August 29, 2023 specific injury claim for the left wrist and knee only. (Defendant Exhibit D.) The claim number for the specific injury was listed as 23D15K924695.

In a letter to defendant dated May 1, 2024, which referenced the cumulative injury case, applicant's attorney indicated that there were "LC 4060 issues(s)" and a "comprehensive medical evaluation" was needed, with a "request being made pursuant to the provisions of LC 4062.2." (Joint Exhibit 1, p. 1.)

On May 16, 2024, applicant's attorney requested a chiropractic panel, and on May 17, 2024, panel 7694889 was issued. The panel was requested through the claim number for the specific injury. A copy of the panel and a letter requesting defendant's strike were sent by applicant's attorney to defendant on May 17, 2024. (Applicant Exhibit 1.)

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

In a letter to applicant dated June 4, 2024, defendant denied applicant's cumulative injury claim. (Defendant Exhibit E.) The claim number for the cumulative injury was listed as 24D15M161268.

Thereafter, on June 19, 2024, defendant requested their own panel, and on June 20, 2024, orthopedic panel 7705125 was issued. Defendant used the claim number for the cumulative injury for the panel request. (Defendant's Exhibits A and H.)

On June 7, 2024, defendant issued a letter to applicant's attorney objecting to applicant's panel 7694889 as it was requested using the incorrect claim number. (Defendant Exhibit F.) Defendant also argued that an orthopedic panel QME was more appropriate given applicant's injuries. (*Ibid.*)

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 November 19, 2024, and 60 days from the date of transmission is January 18, 2025, which is a Saturday. The

next business day that is 60 days from the date of transmission is January 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision was issued by or on January 21, 2025, 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 constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on November 19, 2024, and the case was transmitted to the Appeals Board on November 19, 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 November 19, 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].)

[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.

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 November 1, 2024 F&O addresses both threshold and interlocutory issues, but applicant's Petition only challenges the WCJ's decision regarding medical evidence, which is an interlocutory issue. Thus, we will treat the petition as one seeking reconsideration and consider the 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, as explained below, 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 merits of the Petition, section 4062.2 outlines the process to obtain a QME panel in represented cases for compensability disputes. Section 4062.2 provides that:

(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.

(Lab. Code, § 4062.2(a)-(b).)

In the instant matter, on May 1, 2024, applicant's attorney sent a request for a medical evaluation to defendant in accordance with section 4062.2. The request was made for the cumulative injury. Fifteen days thereafter, on May 16, 2024, applicant's attorney requested a chiropractic panel, and on May 17, 2024, panel 7694889 was issued by the medical unit. It appears, however, that applicant's attorney used the claim number for the specific rather than the cumulative injury in requesting the chiropractic panel.

Applicant's attorney alleges that whether the claim number for the specific or cumulative injury was used is irrelevant since both claims would need to be evaluated by the same QME under *Navarro*, *supra*, 79 Cal.Comp.Cases 418. In *Navarro*, we held 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." (*Id*. at p. 420.) However, sections 4062.3(j) and 4064(a) taken together state that a medical evaluation shall address "all medical issues arising from all injuries reported on one or more claim forms." In keeping with requirements set forth under sections 4062.3(j) and 4064(a), *Navarro* clarified that at the time of evaluation, the evaluator shall consider all issues arising out of any claims reported before the evaluation, and if several subsequent claims of injury are filed before the evaluation takes place, the evaluator shall also consider those claims. (*Navarro*, *supra*, 79 Cal.Comp.Cases at p. 425.) Here, both the specific and cumulative injury claims were filed before an evaluation was completed by a QME. It therefore follows that the same QME should evaluate both claims. This is particularly true here since the claims pertain to overlapping body parts.

The WCJ argues that pursuant to WCAB Rule 30(b)(1), applicant is required to provide the proper claim number to obtain a QME panel. WCAB Rule 30(b)(1), states in relevant part that:

> (1) The party requesting a QME panel online shall:
> (A) Identify the following elements in the appropriate sections:
> 1. Panel Request Information Section
> i. Date of Injury
> ii. Claim Number
> iii. Requesting Party
> iv. Reason QME Panel is being requested
> v. Dispute type
> vi. Name of primary treating physician
> vii. Date of report being objected to
> viii. Date of objection communication
> ix. Specialty of treating physician
> x. QME Specialty Requested
> xi. Opposing Party's QME Specialty Preferred (if known)

(Cal. Code Regs., tit. 8, § 30(b)(1).)

Taking into consideration the fact that the same panel QME would be required for both claims *under Navarro*, the timeliness of the request, and the validity of the claim number used, we believe that the requirements under WCAB Rule 30(b)(1) have been satisfied. To find otherwise would place form over substance. (*County of Kern v. T.C.E.F, Inc.* (2016) 246 Cal.App.4th 301 ["A general principle of statutory construction is that courts do not place form over substance where doing so defeats the objective of a statute, especially a statute designed to protect a public interest. (citations omitted.) It is an 'established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit.' (citations omitted)."]; *Pulaski v. American Trucking Associations, Inc.* (1999) 75 Cal.App.4th 1315, 1328 [64 Cal.Comp.Cases 1231, 1236] ["Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute . . . . Where there is compliance as to all matters of substance technical deviations are not to be given the statute of noncompliance. . . . Substance prevails over form. (citations omitted.)" (internal quotations omitted).]; see also *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal. App. 3d 1102, 1116 [53 Cal. Comp. Cases 502]; *Rivera v. Workers' Comp. Appeals Bd.*

(1987) 190 Cal. App. 3d 1452, 1456 [52 Cal. Comp. Cases 141]; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal. App. 2d 592, 598 [24 Cal. Comp. Cases 274].)

"[I]t is an often-stated principle that the Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits." (*Martino v. Workers' Comp. Appeals Bd.*, (2002) 103 Cal.App.4th 485, 490 [67 Cal.Comp.Cases 1273].) Courts have repeatedly rejected pleading technicalities as grounds for depriving the Appeals Board of jurisdiction. (*Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200–01 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 148, 152–153 [45 Cal.Comp.Cases 866].) Moreover, section 5709 states that "[n]o informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division …" (Lab. Code, § 5709.) "Necessarily, failure to comply with the rules as to details is not jurisdictional." (*Rubio, supra*, at pp. 200–201; see Cal. Code Regs., tit. 8, § 10617.) Similarly, WCAB Rule 10517 specifies that pleadings are deemed amended to conform to the stipulations agreed to by the parties on the record or may be amended by the Appeals Board to conform to proof. (Cal. Code Regs., tit. 8, §10517.) This rule represents the application of California's public policy in favor of adjudication of claims on their merits, rather than on the technical sufficiency of the pleadings.

Lastly, given that Exhibit X is not necessary to the determination of the above issues and was not intended to be submitted by either party as an exhibit, Exhibit X will not be admitted into the record. Accordingly, we treat applicant's Petition as one seeking reconsideration, grant reconsideration, rescind the F&O, and substitute a new F&O which finds applicant's panel valid and defendant's panel invalid.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the November 1, 2024 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 1, 2024 Findings and Order is **RESCINDED** and **SUBSTITUTED** with a new Findings and Order, as provided below.

FINDINGS OF FACT

1. Applicant, Antonina Salamat, while employed on August 29, 2023, as a customer service representative by SBM Site Services, sustained an injury arising out of and arising in the course of employment to the left wrist and left knee (ADJ19457849). Applicant also claims to have sustained an injury arising out of and in the course of employment on August 29, 2023 and during the period from January 1, 2020 through February 15, 2024 to the face, neck, upper extremities, back, and lower extremities (ADJ19457849 and ADJ19203396).

2. During the above dates of injury, the employer's workers' compensation carrier was Safety National Casualty Corporation.

3. Court Exhibit X is not admitted into evidence.

4. Qualified Medical Evaluator panel 7694889 is valid.

5. Qualified Medical Evaluator panel 7705125 is invalid.

6. All other issues remain deferred.

ORDER

1. IT IS ORDERED THAT the parties are to select a Qualified Medical Evaluator from panel 7694889 and proceed with scheduling a qualified medical evaluation accordingly.

2. IT IS FURTHER ORDERED THAT no qualified medical evaluation shall occur with any physicians listed in panel 7705125.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 21, 2025

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

ANTONINA SALAMAT
THE BLEDSOE LAW FIRM
LLARENA, MURDOCK, LOPEZ & AZIZAD

RL/*cs*

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