WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HOLLY SCRIBNER, ***Applicant***

vs.

ROSEWOOD MIRAMAR HOTEL; AIU INSURANCE, administered by GALLAGHER BASSETT, ***Defendants***

Adjudication Numbers: ADJ19589643; ADJ19590251
Santa Barbara District Office

OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks removal of the Joint Findings of Fact issued on October 23, 2024, wherein the workers' compensation administrative law judge (WCJ) found as relevant in ADJ19589643 that (1) while employed during the period December 21, 2021 through March 10, 2024, applicant claims to have sustained injury arising out of and within the course of employment to the left wrist, bilateral feet, left shoulder, cervical spine, thoracic spine, and lumbar spine; (2) qualified medical evaluator (QME) panel number 7720356 is valid; and (3) on September 26, 2024, applicant's attorney had the legal right to set the appointment with Dr. Ovadia.

Defendant contends that the WCJ erroneously found that applicant's attorney had the legal right to set the appointment with Dr. Ovadia.

We received an Answer.

The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will treat the Petition as one for reconsideration, grant reconsideration under the removal standard, and, as our Decision After Reconsideration, we will affirm the joint findings of fact except that we will amend to find that defendant had the right to select Dr. Nguyen as QME and its selection is valid.

FACTUAL BACKGROUND

On October 7, 2024, the matter proceeded to trial in ADJ19589643 as to the following issues:

1. Validity of QME Panel No. 7720356 and Panel No. 7724352.
2. Which party had the right to select the QME and set the QME appointment.

(Minutes of Hearing and Order of Consolidation, October 7, 2024, p. 2:39-42.)

The WCJ admitted an exhibit entitled Defendant's Panel Packet, Denial Panel Request Information and Panel No. 7720356 with Proof of Service, dated August 8, 2024, into evidence. It names Drs. Daniel Ovadia, Thomas Nguyen, and Eli Kupperman as panel orthopedic surgeons and states that it was served upon applicant's attorney by mail. (Ex. A, Defendant's Panel Packet, Denial Panel Request Information and Panel No. 7720356 with Proof of Service, dated August 8, 2024, pp. 5-6.)

In the Report, the WCJ states:

> Defendant pulled the panel in this case on August 8, 2024, and served the panel the same date. They struck Dr. Kupperman on 8/19/2024. The applicant attorney struck Dr. Nguyen, however that strike was late on 8/26/2024. On the same date, the defendant chose Dr. Nguyen as the QME. No appointment was set.
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> The defendant claims that because the applicant attorneys strike was late, they hold the only legal right to selection and to set the QME appointment and that would be with Dr. Nguyen. However, the applicant was the first to set the QME appointment on 9/26/2024 with Dr. Ovadia (Joint Exhibit 1). The defendant claims they could not have set the appointment as they have to wait 10 days. However, the defendant did not set the appointment even after waiting 10 days. According to their PFR at page 7, "Applicant had the legal right to set appointment with Dr. Nguyen after defendant chose Dr. Nguyen on 8/26/24 and defendant has the legal right to wait to set the QME . . . "
>
> (Report, p. 3.)

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 transmitted to the Appeals Board on November 6, 2024, and 60 days from the date of transmission is January 5, 2025. The next business day that is 60 days from the date of transmission is January 6, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on January 6, 2025, so that we have timely acted on the petition 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 Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 6, 2024, and the case was transmitted to the Appeals Board on November 6, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that

[1] 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.

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 November 6, 2024.

II.

Preliminarily, we observe that if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd*. (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision 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 a finding regarding a threshold issue, i.e., that applicant claims to have sustained injury arising out of and within the course of employment to the left wrist, bilateral feet, left shoulder, cervical spine, thoracic spine, and lumbar spine. It follows that the WCJ's decision is a final order subject to reconsideration; and since the Petition only challenges the interlocutory finding that applicant's attorney had the legal right to set the appointment with Dr. Ovadia on September 26, 2024, the removal standard applies to our evaluation of its merits. (See *Gaona*, *supra*.)

Turning to the merits of the Petition, we observe that 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 significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955; see also *Cortez*, *supra*; *Kleemann*, *supra*.) In addition, 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.)

Here, defendant contends that the WCJ's determination that applicant could set an appointment with Dr. Ovadia violates Labor Code section 4062.2 and will cause it substantial prejudice and irreparable harm by denying its right to select the QME.

Labor Code section 4060 provides as relevant:

> (a) This section shall apply to disputes over the compensability of any injury. This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.
> …
> (c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney**, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2**.
> (§ 4060(a)(c) [Emphasis added.])

Labor Code section 4062.2 provides as relevant:

> (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.
>
> (c) **Within 10 days of assignment** of the panel by the administrative director, **each party may strike one name from the panel**. The remaining qualified medical evaluator shall serve as the medical evaluator. **If a party fails to exercise the right to strike a name from the panel within 10 days of assignment of the panel by the administrative director, the other party may select any physician who**

> **remains on the panel to serve as the medical evaluator**. The administrative director may prescribe the form, the manner, or both, by which the parties shall conduct the selection process.
>
> (d) The represented employee **shall be responsible for arranging the appointment for the examination, but upon his or her failure to inform the employer of the appointment within 10 days after the medical evaluator has been selected**, the employer may arrange the appointment and notify the employee of the arrangements. The employee shall not unreasonably refuse to participate in the evaluation.
> (Lab. Code § 4062.2(a)–(d) [Emphasis added.])
>
> WCAB Rule 10605 provides as relevant:
>
> (a) When any document is served by mail, fax, e-mail or any method other than personal service, the period of time for exercising or performing any right or duty to act or respond shall be extended by:
> (1) Five calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record being served is within California.
> (Cal. Code Regs., tit. 8, § 10605(a)(1).)

Under these authorities, represented parties may select a medical evaluator only by the procedure provided by Labor Code section 4062.2. (Lab. Code § 4060.) Under Labor Code section 4062.2, only the party "other" than the "party [that] fails to exercise the right to strike a name from the panel" may "select any physician who remains on the panel to serve as the medical evaluator." (Lab. Code § 4062.2(c).)

Labor Code section 4062.2 otherwise lacks any provision suggesting that a party may select a medical evaluator after failing to strike a name from the panel. Notably, subsection (d) assigns the "responsib[ility]" of making an appointment with the medical evaluator to the applicant without authorizing the applicant to select the evaluator from those remaining on the panel, allowing defendant to make the appointment if applicant fails to do so within ten days "after the medical evaluator has been selected." (Lab. Code § 4062.2(d).)

In the present case, the panel of medical evaluators naming Drs. Ovadia, Kupperman, and Nguyen was served by mail on August 8, 2024; and, pursuant to the foregoing authorities, the parties' ten-day period for objecting to panel members was extended five days. (Ex. A, Defendant's Panel Packet, Denial Panel Request Information and Panel No. 7720356 with Proof of Service, dated August 8, 2024, p. 6; Report, p. 3.) Consequently, the last day to object to a panel member was August 23, 2024. It follows that defendant's August 19, 2024 objection to Dr.

Kupperman was timely, and applicant's August 26, 2024 objection to Dr. Nguyen untimely. Because applicant's objection to Dr. Nguyen was untimely, he remained on the panel and defendant was entitled to—and did—select him as QME on August 26, 2024. (Lab. Code § 4062.2(c); Report, p. 3.) It follows that the WCJ erroneously found that applicant had the legal right to set the appointment with Dr. Ovadia.

Accordingly, we will amend the joint findings of fact to find that defendant had the right to select Dr. Nguyen as QME and its selection is valid.

Accordingly, we will treat the Petition as one for reconsideration, grant reconsideration under the removal standard, and, as our Decision After Reconsideration, we will affirm the joint findings of fact except that we will amend to find that defendant had the right to select Dr. Nguyen as QME and its selection is valid.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Joint Findings of Fact issued on October 23, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Joint Findings of Fact issued on October 23, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

ADJ19589643 (MF)

***

4. Defendant had the right to select Dr. Nguyen as qualified medical evaluator (QME) and its selection is valid.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 6, 2025

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

HOLLY SCRIBNER
STOUT, KAUFMAN, HOLZMAN & SPRAGUE
SATZMAN & ASSOCIATES

SRO/*cs*

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