WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ABRAHAM DURAN LOPEZ, *Applicant*

vs.

JAMES E. ROBERTS-OBAYASHI CORPORATION and STARR INDEMNITY AND LIABILITY CORPORATION; administered by ESIS, *Defendants*

Adjudication Number: ADJ13319375
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the September 27, 2024 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found that materials from applicant's third party civil claim, including a November 30, 2022 report of Mechel Henry, M.D., transcript of Dr. Henry's February 21, 2023 deposition, transcript of the October 4, 2023 trial proceedings, and a medical presentation/demonstrative prepared by Dr. Henry, were inadmissible and unable to be submitted to the panel Qualified Medical Evaluators (QMEs) for review and comment. The WCJ found that the reporting, testimony, and exhibits were obtained for the sole purpose of contradicting the panel QMEs in the instant case and were not those of a consulting physician, or a treating physician, agreed medical evaluator, or panel QME, as contemplated under Labor Code[1] section 4061(i).

Applicant contends that failure to admit the above items would mean an incomplete medical record and further delays as the materials are relevant and admissible under section 4062.3(a) and *Jacobs v. Trident Maritime Systems* (2024) 89 Cal.Comp.Cases 588 [2024 Cal. Wrk. Comp. P.D. LEXIS 47].

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

We have received an Answer from defendant. 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 (Petition), the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition, rescind the F&O, and substitute it with a new F&O which finds that the November 30, 2022 report of Mechel Henry, M.D. (Exhibit 6), transcript of Dr. Henry's February 21, 2023 deposition (Exhibit 7), transcript of the October 4, 2023 trial proceedings (Exhibit 8), and a medical presentation/demonstrative prepared by Dr. Henry (Exhibit 9), are admissible and allowed to be sent to the panel QMEs for review and comment.

FACTS

Applicant, while employed by defendant as union laborer on January 28, 2020, sustained an industrial injury to his brain, neck, back, chest, bilateral ribs, right shoulder, nervous system, and psyche. Applicant also claimed injuries to the respiratory system and left shoulder.

In addition to the workers' compensation claim, applicant filed a third-party civil claim related to the January 28, 2020 incident. Dr. Mechel Henry, a doctor of "physical medicine and rehabilitation" and a "pain management specialist," was retained to examine the applicant and provide a consultative report for this claim. (Petition, p. 4.) Dr. Henry was deposed on February 21, 2023 and testified at the October 4, 2023 trial for which she also prepared a medical presentation and demonstrative.

For the workers' compensation claim, the parties retained Dr. Patrick McGahan, Dr. Shen Wang, and Dr. Gregory Firman as panel Qualified Medical Evaluators (QMEs) in the specialties of orthopedic surgery, neurology, and psychiatry, respectively. Reports were issued by the various panel QMEs. A neuropsyche report was also issued by Dr. Robert Perez, who is not a panel QME in the instant case.

Applicant proposed sending a copy of Dr. Henry's November 30, 2022 report to the panel QMEs for review. Defendant was not in agreement.

On August 28, 2024, a trial was held on the sole issue of whether the November 30, 2022 report of Dr. Henry (Exhibit 6), transcripts from Dr. Henry's February 21, 2023 deposition and the

October 4, 2023 trial (Exhibits 7, 8), and medical presentation at trial (Exhibit 9) could be provided to the panel QMEs for review and comment.

On September 27, 2024, the WCJ issued a Findings and Order indicating that the above materials were inadmissible and unable to be sent to the panel QMEs.

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.
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> (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.
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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 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 October 23, 2024, and 60 days from the date of transmission is December 22, 2024, which is a Sunday. The next business day 60 days from the date of transmission is Monday, December 23, 2024. This decision was issued by or on December 23, 2024, 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 October 23, 2024, and the case was transmitted to the Appeals Board on October 23, 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 October 23, 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].) 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 September 27, 2024 F&O addresses both threshold and interlocutory issues, but applicant's Petition only challenges the WCJ's decision regarding the admission of medical evidence, which is an interlocutory issue. As such, we will consider applicant's 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, defendant and the WCJ rely on *Batten v. Workers' Comp. Appeals Bd.* (*Batten*) (2015) 241 Cal.App.4th 1009, 1016 [80 Cal.Comp.Cases 1256] in arguing that the subject materials should be excluded. The issue in *Batten* was the admissibility of a report of a privately retained physician offered for the purpose of rebutting the QME's opinions. The court held that:

> Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061(i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.
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> (*Batten*, *supra*, at pp. 1009, 1016.)

Section 4605 states the following:

> Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.

And section 4061(i) states:

> No issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator. With the exception of an evaluation or evaluations prepared by the treating physician or physicians, no evaluation of permanent impairment and limitations resulting from the injury shall be obtained, except in accordance with 3 Section 4062.1 or 4062.2. Evaluations obtained in violation of this prohibition shall not be admissible in any proceeding before the appeals board.

In the instant case, unlike in *Batten*, Dr. Henry was not retained solely to rebut the opinion of the panel QMEs. As noted above, Dr. Henry was retained to examine the applicant and provide a consultative report in applicant's *third-party civil case*.

We believe the current case is more akin to *Jacobs v. Trident Maritime Systems* (2024) 89 Cal.Comp.Cases 588 [2024 Cal. Wrk. Comp. P.D. LEXIS 47] wherein the reports of Dr. James Fait from the applicant's concurrent Longshore and Workers' Compensation Act (LHWCA) case were found to be admissible. In that case, we similarly held that the doctor's reports were "not privately retained solely for the purpose of rebutting the opinion of the QME" in applicant's workers' compensation case. (*Id.*) We found the reports of Dr. Fait were not those of a "treating physician, an agreed medical evaluator, or a qualified medical evaluator, as contemplated by section 4061(i), nor [were] they the reports of a consulting physician." (*Id*.) We find that the same applies here.

As noted in *Jacobs*, section 4062.3(a) provides that any relevant "medical and non-medical records relevant to determination of the medical issue" may be provided "to the qualified medical evaluator" for review. In the current matter, we find that the reporting, testimony, and exhibits of Dr. Henry are relevant to the determination of the medical issues at hand.

Further, the California Supreme Court has analyzed the admissibility of medical reports in workers' compensation proceedings and has stated, in pertinent part, that:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports … . Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board …" except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.

(*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal. 4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

As noted above, we do not believe Dr. Henry's reporting constitutes reporting from a consulting physician as contemplated under section 4064, or a treating physician, agreed medical evaluator, or qualified medical evaluator, as contemplated under section 4061(i). The importance of *Valdez*, however, is that it underscores the fact that the Legislature seeks an expansive approach regarding admissibility of medical evidence.

Section 4064(d) provides that:

> The employer shall not be liable for the cost of any comprehensive medical evaluations obtained by the employee other than those authorized pursuant to Sections 4060, 4061, and 4062. *However, no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense.* In no event shall an employer or employee be liable for an evaluation obtained in violation of subdivision (b) of Section 4060. *All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in Section 4060, 4061, 4062, 4062.1, or 4062.2.*
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> (Lab. Code, § 4064(d), emphasis added.)

And section 4605 provides that:

> *Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires.* Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. *A qualified medical evaluator or authorized treating physician shall address any report procured* pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.

(Lab. Code, § 4605, emphasis added.)

Aside from the expansiveness of the above code sections, as emphasized in *Valdez* and other cases, it is well established under both, the California and United States Constitutions, that parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [97 Cal Rptr. 2d 852, 65 Cal.Comp.Cases 805].) A fair hearing is "…one of 'the rudiments of fair play' assured to every litigant …" (*Rucker, supra* at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission…must find facts and declare and enforce rights and liabilities, - in short, it acts as a court, and it must observe the mandate of the constitution of the United States and this cannot be done except after due process of law." (*Id.* at p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, at 157- 158 citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) The Appeals Board also has the discretionary authority to develop the record when appropriate to provide due process or fully adjudicate the issues. (Lab. Code §§ 5701, 5906). As explained in *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924], "The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."

Further, the court in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc.), has clarified that a decision "must be based on admitted evidence in the record" (*Id.* at p. 478.) and must be supported by substantial evidence. (§§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) This "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra,* at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Additionally, 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" and may not leave matters undeveloped where additional discovery may be necessary. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].)

These cases and statutes underscore the importance of allowing full consideration of the entire evidentiary record, in furtherance of the substantial justice required in workers' compensation proceedings.

Defendant argues that Dr. Henry's opinions are inherently biased since Dr. Henry was selected and her services paid, by applicant. (Answer, p. 4.) We disagree. The process by which Dr. Henry was retained to serve as an expert in his applicant's third-party claim is no different than the process highlighted under section 4605 above for consulting or attending physicians working on workers' compensation matters. Further, as indicated in defendant's Answer, QMEs are held to a code of conduct specific to workers' compensation cases. (*Id*.) As such, we expect that they will abide by this code of conduct and provide fair, unbiased, and impartial opinions. Additionally, Dr. Henry's reports have already been reviewed by applicant's primary treating physician, Dr. Navin Mallavaram, as evidenced by Dr. Mallavaram's permanent and stationary report dated September 12, 2023. (Exhibit 5.) As such, Dr. Henry's materials are arguably already a part of the record.

Accordingly, we will grant the Petition, and rescind and substitute the September 27, 2024 F&O to reflect that the November 30, 2022 report of Mechel Henry, M.D. (Exhibit 6), transcript of Dr. Henry's February 21, 2023 deposition (Exhibit 7), transcript of the October 4, 2023 third-party civil trial (Exhibit 8), and Dr. Henry's medical presentation/demonstrative (Exhibit 9) are admissible and may be provided to the panel QMEs for review and comment.

Finally, we note that under "Findings of Fact" number 3 wherein the WCJ outlines the periods of temporary and permanent disability paid, we have located a typo in the second period of temporary disability and a missing date from the first period of permanent disability. The new F&O will reflect the proper dates, as stipulated by the parties in the January 16, 2024 Pretrial Conference Statement.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the September 27, 2024 Findings and Order is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 27, 2024 Findings and Order is **RESCINDED** and **SUBSTITUTED** with a new Findings and Order, as provided below.

FINDINGS OF FACT

1. Applicant, Abraham Duran Lopez, born [], while employed on January 28, 2020 as a union laborer, occupational group number 480, in Alameda, California, by James E. Roberts Obayashi Corporation sustained an injury arising out of and in the course of employment to his brain, neck, back, chest, bilateral ribs, right shoulder, nervous system, and psyche. Applicant claims to have sustained injury to his respiratory system and left shoulder. At the time of the injury, the employer's workers' compensation carrier was Starr Indemnity and Liability Corporation, administered by ESIS.

2. At the time of the injury, the employee's earnings were $1,819.58 per week warranting indemnity rates of $1,213.06 for temporary disability and $290.00 for permanent disability.

3. Temporary disability has been paid for the periods from January 29, 2020 through April 6, 2021 and April 20, 2021 through February 21, 2022. Permanent disability has been paid for the period April 7, 2021 through April 20, 2021 and February 22, 2022 to the present time and ongoing. Applicant has been adequately compensated for all periods of temporary disability claimed through February 22, 2022.

4. The primary treating physician is Navin Mallavaram, M.D.

5. Orthopedic QME, Dr. Patrick McGahan's first report is dated December 12, 2020. Neurology QME, Dr. Shen Wang's first report is dated July 7, 2021. Psychiatry QME, Dr. Gregory Firman's first report is dated October 29, 2021. Dr. Robert Perez issued a neuropsyche report on March 3, 2022.

6. The November 30, 2022 report of Mechel Henry, M.D. (Exhibit 6); the transcript of Dr. Henry's February 21, 2023 deposition (Exhibit 7); the transcript of the October 4, 2023 third-party civil trial proceedings (Exhibit 8); and Dr. Henry's medical presentation/demonstrative from the trial proceedings (Exhibit 9) are admissible.

ORDER

IT IS ORDERED that the November 30, 2022 report of Mechel Henry, M.D. (Exhibit 6); the transcript of Dr. Henry's February 21, 2023 deposition (Exhibit 7); the transcript of the October 4, 2023 trial proceedings (Exhibit 8); and Dr. Henry's medical presentation/demonstration (Exhibit 9) are admissible and may to be sent to the panel QMEs for review and comment.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 20, 2024

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

ABRAHAM DURAN LOPEZ
APPEL LAW FIRM
BRADFORD & BARTHEL

RL/*cs*

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