WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICK O'REILLY, ***Applicant,*** **vs.** **STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS; STATE COMPENSATION INSURANCE FUND,** ***Defendant.***	**Case No. ADJ6498601** **OPINION AND ORDERS DISMISSING PETITION FOR RECONSIDERATION, GRANTING REMOVAL AND DECISION AFTER REMOVAL**

Applicant seeks reconsideration of the Findings and Order issued by the workers' compensation administrative law judge (WCJ) on May 17, 2010, wherein the WCJ found, based on the parties' stipulations, that applicant, while employed as a clinical psychologist/furniture mover on April 3, 2008, sustained industrial injury to his left knee. The WCJ also found that Brendan Morley, M.D., is not the panel qualified medical examiner (QME) in this case. In the Opinion on Decision, the WCJ found that applicant is liable for the cost of Dr. Morley's report.

Applicant contends the WCJ erred in finding that Dr. Morley is not the panel QME in this case and that applicant must bear the cost of the examination, arguing that the appointment with Dr. Morley is valid because it was scheduled in accordance with the Labor Code and pertinent regulations.

We have considered the allegations of applicant's petition and we have reviewed the entire record in this matter. Defendant filed an answer. The WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition for reconsideration be denied, and that removal be granted to study the issues in the case.

For the reasons discussed below, we will dismiss applicant's petition for reconsideration because it was not taken from a final order subject to reconsideration. However, because we find that the WCJ's decision has subjected the applicant to significant prejudice, we will treat applicant's petition for reconsideration as one for removal, rescind the May 17, 2010 Findings and Order, and return this matter to the trial-level WCJ for further proceedings.

FACTS

As relevant here, applicant sustained an admitted industrial injury to his left knee on April 3, 2008 while employed by defendant as a clinical psychologist/furniture mover. On December 11, 2008, applicant underwent a partial meniscectomy by his treating physician, Eugene Wolf, M.D.

On March 19, 2009, the defense adjuster wrote to applicant's counsel proposing the use of an AME, and listing three orthopedic specialists. Defendant requested that if applicant disagreed with defendant's proposed physicians, that applicant respond with his proposed AMEs. On April 1, 2009, applicant's counsel sent correspondence to defendant objecting to the primary treating physician's opinions on the issue of permanent disability and future medical care. Agreed medical examiner names were offered to defendant. No agreement was ever reached on an AME.

On April 13, 2009 applicant filed a request for a panel QME under Labor Code §4062.2[1] requesting that the panel issue in the specialty of pain medicine (MPA). (Applicant Ex. 1.) Defendant did not object to this request for a panel QME nor to the specialty preference requested by applicant.

On June 1, 2009, the Medical Unit of the Division of Workers' Compensation issued a panel (No. 1038384), naming Arun Anand, M.D.; Dr. Morley; and Jacob Rosenberg, M.D. (Applicant Ex. 2.)

On June 2, 2009, applicant inquired of defendant if an agreement could be reached on one of the panel members as an AME (Applicant Ex. 3.), and defendant suggested Dr. Anand

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

(Defendant's Ex. K). The parties were unable to agree on an AME. On June 15, 2009, applicant wrote to the adjuster, striking Dr. Anand from the panel list. Defendant did not make a timely strike of any physician from the panel list.

On June 18, 2009, applicant's counsel contacted Dr. Morley's office and obtained an initial appointment date of November 4, 2009. Notice of this appointment was sent to defendant on 6/18/09. (Applicant Ex. 5.) On June 19, 2009, applicant's counsel contacted his office to obtain an earlier appointment date.

On June 22, 2009, defendant advised applicant that it objected to the November 4, 2009 appointment with Dr. Morley, and further advised that "the new panel will be sent in 5-10 days replacing Brendan Morley, M.D." (Defendant Ex. N.) Defendant did not advise applicant that defendant had contacted the Medical Unit to obtain a replacement QME.

On June 23, 2009, Dr. Morley's staff returned the calls made by applicant's counsel and advised of the availability of an earlier QME appointment for July 29, 2009. Applicant accepted this appointment date and notified defendant of the July 29, 2009 appointment. (Applicant Ex.6.)

On June 24, 2009, the Medical Unit issued a new panel (No. 1046963) listing Dr. Anand, Dr. Rosenberg, and Chris Chen, M.D. (Applicant Ex. 7 and Defendant Ex. P.) Applicant objected to this new panel. On July 6, 2009, defendant sent a letter to applicant striking Dr. Chen from the new panel. (Defendant Ex. R.)

On July 15, 2009 defendant sent letter to applicant regarding an appointment defendant arranged with Dr. Rosenberg for July 23, 2009. (Defendant Ex. T.) Applicant did not attend the appointment with Dr. Rosenberg. Applicant attended the July 29, 2009 appointment with Dr. Morley.[2] The WCJ did not admit Dr. Morley's report into evidence.

On February 1, 2010, the matter proceeded to trial on the issue of whether Dr. Morley had been properly selected as panel QME. On May 17, 2010, the WCJ issued the disputed Findings

---

[2] The record reflects that applicant's appointment with Dr. Morley was set for July 29, 2009. However, Dr. Morley's report, signed on August 21, 2009, references an office visit on July 24, 2009. (Applicant's Ex. 8, marked for identification only.)

and Order, finding that Dr. Morley was not the operative panel QME. Applicant appeals from the May 17, 2010 decision.

DISCUSSION

With respect to applicant's petition for reconsideration, we note that reconsideration may be had only of a final order, decision, or award. (Lab. Code §§ 5900, subd. (a); 5902.) Interlocutory procedural orders are not final orders within the meaning of Labor Code section 5900. An order which does not dispose of the substantive rights and liabilities of those involved in a case is not a final order. (2 Cal. Workers' Compensation Practice (Cont.Ed.Bar 2009) §§ 21.8-21.9, pp. 1678-1679.) A "final" order has been defined as one "which determines any substantive right or liability of those involved in the case." (*Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 660]; *Beck v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 190 (writ denied).)

Here, the WCJ's May 17, 2010 Findings and Order is an interim procedural order, and is not a final order as it does not determine applicant's entitlement to workers' compensation benefits. Interim procedural orders or orders regarding discovery or evidentiary matters are not final orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650, 655]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Hansen v. Workers' Comp. Appeals Bd.* (1988) 53 Cal.Comp.Cases 193 (writ den.); *Jablonski v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 399 (writ den.).) Therefore, we will dismiss applicant's petition for reconsideration.

However, the Appeals Board is authorized, pursuant to section 5310, to remove to itself, as it deems necessary in any workers' compensation matter, "the proceedings in any claim." Here, we conclude that removal is warranted because we find that the WCJ erred in finding that Dr. Morley was not the panel QME and this finding could result in significant prejudice to applicant. We will treat the petition for reconsideration as one for removal, grant removal, and rescind the May 17, 2010 Findings and Order.

Section 4062.2 controls the procedure for injuries and alleged injuries occurring on or after January 1, 2005, when the employee is represented by an attorney. If a represented injured worker and the employer are unable to agree on a medical issue and a comprehensive medical evaluation is required "to resolve any dispute arising out of an injury or a claimed injury" the "evaluation shall be obtained only as provided" in section 4062.2. (Lab. Code, § 4062.2(a).) The employer and the injured worker are expected to seek agreement on an AME to prepare a report resolving the disputed issue. Either party may commence the AME selection process by written request to the other party, proposing one or more physicians to do the evaluation. (Lab. Code, § 4062.2(b).) If no agreement is reached within 10 days of the first written proposal, either party may request the assignment of a three-member QME panel. (See, Lab. Code, § 4062.2(c).)

Administrative Director Rule 33(e) provides that if an appointment with a panel QME is not available within 60 days of the request for appointment, the injured worker may notify the medical director, and an additional QME will be added to the panel unless the injured worker waives the delay. (Cal. Code Regs., tit. 8, § 33(e).) Administrative Director Rule 31.5(a)(2) provides that a replacement QME may be obtained when the following occurs:

> "A QME on the panel issued cannot schedule an examination for the employee within sixty (60) days of the initial request for an appointment, or if the 60 day scheduling limit has been waived pursuant to section 33(e) of Title 8 of the California Code of Regulations, the QME cannot schedule the examination within ninety (90) days of the date of the initial request for an appointment." (Cal. Code Regs., tit. 8, § 31.5(a)(2).)

In light of the facts of this case, we find that the WCJ's decision was not justified. The first appointment scheduled with Dr. Morley for November 4, 2009 was outside the 60-day period. Defendant then advised applicant that it objected to the November 4, 2009 appointment with Dr. Morley. Applicant's attorney obtained a new date with Dr. Morley, i.e., July 29, 2009. This new appointment was within the 60 days, so it cured any non-compliance with the applicable rules. The original QME panel, Number 1038384, should remain in place as defendant's objection does not

///

invalidate the panel, and applicant was able to obtain an appointment with Dr. Morley within 60 days.

We also note that the new panel issued after the date that applicant obtained a rescheduled appointment with Dr. Morley. The Medical Unit's "dignity" in issuing a new panel is not the same as a WCJ or the WCAB issuing an order after considering and adjudicating an issue. Here, all the Medical Unit did was respond to defendant's request, and that request was based on incomplete information.

With respect to communications with a medical evaluator, we note that section 4062.3 governs communications with an agreed medical examiner (AME) or QME. Ex parte communications with an AME or QME selected from a panel are forbidden (Lab. Code, § 4062.3(f)), but written communications served on the other party are permitted. (Lab. Code, § 4062.3(e).)

In *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 75 Cal.Comp.Cases 397, the Court of Appeal, Second Appellate District, Division Five annulled a decision of the WCAB allowing a panel QME to telephone defense counsel, and held that section 4062.3 expressly prohibits ex parte communication with a panel QME (with one exception not applicable here). In *Alvarez*, the Court of Appeal stated that this "statutory language clearly evidences the intent of the Legislature to prohibit unauthorized ex parte communication," whether written or oral, between a party and an AME or panel QME. (*Id.,* at p. 403.)

However, in this case, all of the communications were made only with staff members of Dr. Morley's office, and were not made directly with the doctor. By its own terms, section 4062.3(f) does not include "staff" among the restricted communications. The plain language of section 4062.3 governs this matter. Moreover, we find that issuance of a new panel in this case is detrimental to the goal of section 4062.5 to ensure expeditious litigation.

Accordingly, because we find that this matter would be unduly delayed by requiring applicant to undergo an examination with a new panel QME, and that he would therefore suffer significant prejudice (Cal. Code Regs., tit. 8, § 10843(a)(1)), we will grant removal pursuant to

Labor Code § 5310, rescind the May 17, 2010 Findings and Order, and return this matter to the trial level for further proceedings and a new decision by the WCJ.

For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration of the May 17, 2010 Findings and Order is **DISMISSED.**

IT IS FURTHER ORDERED that removal of the May 17, 2010 Findings and Order is **GRANTED.**

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the May 17, 2010 Findings and Order **RESCINDED** and that the matter is **RETURNED** to the trial level workers' compensation administrative law judge for further proceedings, as necessary, and a new decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO

I CONCUR,

ALFONSO J. MORESI

FRANK M. BRASS

WORKERS' COMPENSATION APPEALS BOARD SEAL

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

AUG 02 2010

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

PATRICK O'REILLY
LARSEN VANDERSLOOT
SCIF STATE EMPLOYEES

MG/csl