WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ESTELA CHANCHAVAC, ***Applicant,*** **vs.** **LB INDUSTRIES, INC.; SENTRY INSURANCE, A MUTUAL COMPANY,** ***Defendants.***	**Case No. ADJ9052773** **(Los Angeles District Office)** **ORDER DISMISSING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR REMOVAL**

We have considered the allegations of the Petition for Reconsideration and Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will dismiss the petition to the extent it seeks reconsideration and deny it to the extent it seeks removal.

A petition for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*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, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, 81 Cal.App.4th at p. 1075 [65 Cal.Comp.Cases at p. 655] ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions,

are not 'final' "); *Rymer*, *supra*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals* (*Kramer*), *supra*, 82 Cal.App.3d at p. 45 [43 Cal.Comp.Cases at p. 665] ("[t]he term ['final'] does not include intermediate procedural orders").) Such interlocutory decision include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ's decision solely resolves an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision and the petition will be dismissed to the extent it seeks reconsideration.

We will also deny the petition to the extent it seeks removal. Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez, supra; Kleemann, supra.*) Also, 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, § 10843(a).) Here, for the reasons stated in the WCJ's report, we are not 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 petitioner.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

KATHERINE ZALEWSKI

DEPUTY CRISTINE E. GONDAK

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 27 2015

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

BRADFORD & BARTHEL
ESTELA CHANCHAVAC
GARRETT LAW GROUP
GRANCELL, STANDER, REUBENS, THOMAS & KINSEY

bgr

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ9052773

ESTELA CHANCHAVAC	**vs.**	**LB INDUSTRIES INC; SENTRY SELECT STEVENS POINT, HARTFORD SACRAMENTO;**
DATE(S) OF INJURY:		**08/01/2012 – 08/01/2013**
WORKERS' COMPENSATION JUDGE		**RICHARD SHAPIRO**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION/REMOVAL

I.

INTRODUCTION

By decision dated 6/16/15 it was found that Sentry Select had been properly assigned a QME panel in orthopedics, and that applicant and Sentry should utilize the doctor remaining after the striking process to resolve any disputes between them. Applicant has filed a timely, verified Petition for Reconsideration arguing that, as it had been previously adjudicated that applicant and co-defendant Twin City Fire Insurance Company would have to utilize a chiropractic panel QME, Sentry was not only prohibited from obtaining a panel in a different specialty, but could not obtain a separate QME panel at all.

///

///

II.

DISCUSSION

Applicant argues that, as there is only one employer, there can be only one QME panel. It should be noted at the outset that the employer is no longer a party to this action. Its carriers have entered their appearances in this case, so the employer is effectively dismissed as a party. cf. L.C. section 3757. Applicant argues that the two carriers are in "privity", although they most assuredly are not, as they have their own interests and liabilities which may be in conflict, and which may therefore have to be arbitrated later on. cf. L.C. section 5275(a) (2). Applicant argues that only one of the carriers could seek a QME panel, but does not explain how that would not violate the right to due process of the other. That is particularly true here, given that most of the exhibits introduced by applicant relate to the selection procedure in which applicant and Twin City previously engaged, and they show that Sentry was entirely shut out from that process. Indeed, as noted in the Opinion the request by applicant for a QME panel listed only the adjusting agency for Twin City and its law firm as defendant on the form. According to the 10/3/13 proof of service, only counsel for Twin City was even served with the document. The undersigned is aware of no other situation in which multiple carriers could not conduct their own independent discovery in a case, and sees nothing in section 4062.2 which prohibits multiple carriers from utilizing the statute to obtain their own qualified medical examiners.

Applicant argues that Sentry should have solicited an opinion from the judge at the 5/17/14 trial as to whether it could obtain its own QME panel. It most certainly could not have done so. The sole issue at that proceeding was which of the two separate QME panels obtained by applicant and co-defendant Twin City should be used by those parties in resolving the issues between them. Sentry had not yet even attempted to obtain a panel from the medical director, so

the issue was not even ripe for adjudication, quite apart from the fact that it had nothing to do with the issue being presented to the judge. Once again, the undersigned believes that the previous litigation between applicant and Twin City in no way affected the rights of Sentry.

Applicant argues that Sentry should not have requested a panel in a specialty other than that of the primary treating physician. The undersigned disagrees for several reasons. As between Sentry and applicant, Sentry was the only party that had requested a QME panel and was therefore the "requestor" with the right to designate the specialty of the QME panel. cf. ADR 30.5, 31(a). Applicant submitted no evidence at trial showing that Sentry failed to submit "relevant documentation" that justified the request for a panel in a different specialty (cf. ADR 31.1(b)), nor did it submit in the proceedings before the undersigned evidence showing that a panel in orthopedics was inappropriate in this case. cf. ADR 31.5(a) (9). The Medical Director found nothing deficient in the request by Sentry, and the undersigned has been presented with no evidence that would invalidate that determination.

Applicant argues that permitting each defendant to obtain its own QME evaluations will result in "dueling reports" that will complicate the proceedings. That is certainly true, which is why the legislature provided a simple expedient to avoid the problem. As noted in the Opinion, applicant could simply have elected against Twin City, thereby stopping Sentry from conducting any discovery at all. Cf. Kelm v Koret of California (1981) 46 CCC 113. As noted in that decision, the election process under L.C. section 5500.5 is specifically designed "for the purpose of ameliorating the procedural morass which has faced the board in multiple defendant cases", and to "avoid the confusion and delay inevitable where multiple defendants are involved." Although this option was presented to applicant on the morning of trial, she steadfastly refused to avail herself of it. She has instead insisted that Sentry remain an active party defendant in this

case, while simultaneously attempting to prevent it from acting. The undersigned believes she cannot have it both ways. If she does not wish to designate one carrier with whom she wishes to litigate, she must litigate with all of them, all of whom must in turn be permitted to defend their own interests as they see fit. There is simply no basis or precedent for designating one carrier as some sort of "lead carrier" which other carriers must follow, or the carrier in which all other carriers are in "privity" and therefore bound by its decisions and actions.

III.

RECOMMENDATION

It is recommended that applicant's Petition for Reconsideration be denied.

Date: 7/14/2015

Respectfully submitted,

Richard Shapiro

RICHARD SHAPIRO
WORKERS' COMPENSATION JUDGE
WORKERS' COMPENSATION APPEALS BOARD

Filed and Served by Mail on:
7/16/15 on all parties as shown on the Official Address Record.
By: Maria Walker