

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THEODORE DAVIS,

Petitioner,

v.

WORKERS' COMPENSATION
APPEALS BOARD and CITY OF
MODESTO,

Respondents.

F074957

(WCAB Nos. ADJ9468922
& ADJ9467074)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of review from a decision of the Workers' Compensation Appeals Board. Katherine Zalewski, Jose H. Razo, and Marquerite Sweeney, Commissioners. Anne J. Horelly, Workers' Compensation Administrative Law Judge.

Mastagni Holstedt, Gregory G. Gomez and Andrew R. Miller for Petitioner.

Richard L. Newman and Anne Schmitz for Respondent Workers' Compensation Appeals Board.

Stockwell, Harris, Woolverton & Helphrey, Eric G. Helphrey and Joseph F. Schneider for Respondent City of Modesto.

-ooOoo-

* Before Levy, A.P.J., Franson, J., and Peña, J.

Theodore Davis (Davis) petitions for a writ of review from an order of the Workers' Compensation Appeals Board (WCAB). (Lab. Code,¹ § 5950; Cal. Rules of Court, rule 8.495.) In light of the WCAB's admission that it failed to consider a relevant Labor Code provision, we grant the petition, vacate the WCAB's decision, and remand for further proceedings.

BACKGROUND

Davis filed two applications for adjudication of his workers' compensation claim alleging he contracted prostate cancer due to both specific industrial exposure and as a cumulative trauma injury through March 31, 2014, while performing his duties as a firefighter for the City of Modesto (Modesto).

The parties selected Thomas Allems, M.D., as the panel Qualified Medical Examiner (QME) during the discovery process. Dr. Allems produced two medical-legal reports concluding Davis's cancer was not related to his employment.

At his own expense, Davis hired Gerald Besses, M.D., to review Dr. Allems's reports and to evaluate him regarding the causation of his prostate cancer. Davis forwarded Dr. Besses' reporting to Dr. Allems with a request to prepare a supplemental report addressing Dr. Besses' evaluation, but Modesto objected and filed a declaration of readiness to proceed to a hearing, claiming the request was an attempt to violate the workers' compensation discovery process.

In April 2016, a workers' compensation administrative law judge (WCJ) concluded Dr. Besses' report was not admissible because it was not obtained pursuant to section 4060 (*Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 (*Batten*)), but that the report may nevertheless be reviewed and commented on by Dr. Allems as the QME (§ 4605).

¹ Further statutory references are to the Labor Code unless otherwise indicated.

Modesto petitioned the WCAB for reconsideration. In a July 15, 2016, opinion, the WCAB treated the petition as one for removal, granted removal, dismissed reconsideration, and rescinded the WCJ's decision finding that Dr. Besses' report was reviewable by the QME.

As the newly aggrieved party, Davis petitioned the WCAB for reconsideration or removal, largely faulting the *Batten* court's analysis of section 4605 as deficient in the context of causation. In an October 3, 2016, opinion, the WCAB addressed the appropriateness of reconsideration versus removal and ultimately denied reconsideration and dismissed removal, but did not elaborate on *Batten* or section 4605's relevance to the current matter.

Davis filed the present petition for writ of review with the Third Appellate District, which the Supreme Court subsequently transferred to this court for proper venue. (§ 5950.) In addition to an answer from Modesto, the WCAB filed a letter brief stating it had reviewed the petition and determined it failed to address section 4605 in its October 3, 2016, decision. Accordingly, the WCAB asks this court to grant the petition for review, annul the WCAB's decision, and remand to the WCAB for further proceedings.

DISCUSSION

Davis contends the WCAB acted in excess of its powers and issued an unreasonable award in concluding that his self-procured medical report was not reviewable by the QME.

Between the WCAB's July 15, 2016, and October 3, 2016, opinions, the WCAB relied primarily on the discovery procedures under sections 4060-4062.2, *Batten, supra*, 241 Cal.App.4th 1009, and California Code of Regulations, title 8, section 35,

subdivision (e) (WCAB Rule 35(e)),² but neither opinion specifically addressed the argument raised by Davis on reconsideration and again before this court challenging the WCAB's decision under section 4605, which provides:

“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.”

In its answer to the current petition, the WCAB concedes that it realizes it failed to address section 4605, and asks this court to annul its October 3, 2016, decision and to remand that matter to the WCAB for further proceedings.

Given the WCAB's admission it did not consider section 4605, which is also apparent from the face of its October 3, 2016, opinion, we conclude the WCAB's decision fails to “state the evidence relied upon and specify in detail the reasons for the decision” as required under section 5908.5. “The purpose of this section requiring the appeals board to specify in detail the reasons for its decision is to assist the reviewing court to ascertain principles relied upon by the lower tribunal to help avoid careless or arbitrary action and to make the right of appeal more meaningful.” (*Burbank Studios v. Workers' Comp. Appeals Bd.* (1982) 134 Cal.App.3d 929, 936.) The WCAB's failure to set forth its reasoning in adequate detail constitutes a sufficient basis to annul the decision and remand for a statement of reasons. (*Le Vesque v. Workers' Comp. Appeals Bd.*

² WCAB Rule 35(e) provides in relevant part: “In no event shall any party forward to the evaluator ... any medical report or record or other information or thing which has been stricken, or found inadequate or inadmissible by a Workers' Compensation Administrative Law Judge, or which otherwise has been deemed inadmissible to the evaluator as a matter of law.”

(1970) 1 Cal.3d 627; *Painter v. Workers' Comp. Appeals Bd.* (1985) 166 Cal.App.3d 264, 268; *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 470.)

Because the deficiency of the WCAB's reasoning is apparent from the face of its decision, certification of the record and further briefing would add nothing to the presentation already submitted. (See *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 697.)

Nothing in this decision should be construed as expressing this court's opinion regarding the merits of Davis's claims.

DISPOSITION

Let a writ of review issue returnable before this court forthwith.

The WCAB's October 3, 2016, "Opinion and Orders Denying Petition for Reconsideration and Dismissing Petition for Removal" is annulled. The matter is remanded to the WCAB to conduct any further proceedings it deems appropriate.