WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE ROJAS, *Applicant*

vs.

ALAMILLO REBAR, INC., insured by OLD REPUBLIC GENERAL INSURANCE CORP., adjusted by GALLAGHER BASSETT SERVICES; PACIFIC STEEL GROUP, insured and administered by THE HARTFORD, *Defendants*

Adjudication Numbers: ADJ12117806; ADJ18451814
Lodi District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Pacific Steel Group, insured and administered by The Hartford (Hartford) seeks reconsideration of the October 4, 2024 Amended Findings of Fact, [Awards], and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant's pending application in Case No. ADJ18451814 was not duplicative of his filing in Case No. ADJ12117806. The WCJ further determined that the presumption of compensability of Labor Code[1] section 5402 was inapplicable, and that Jeffrey Nerenberg, M.D., was the valid Qualified Medical Evaluator (QME) in ADJ18451814. The WCJ ordered that the matter be set for Mandatory Settlement Conference regarding information requested by the WCJ.

Defendant contends that applicant's claim in ADJ18451814 is duplicative of his claim in ADJ12117806 and must be dismissed pursuant to WCAB Rule 10455(a) (Cal. Code Regs., tit. 8, § 10455(a)). Defendant further seeks sanctions under section 5502(d) for applicant's alleged bad faith filings.

[1] All further references are to the Labor Code unless otherwise noted.

We have not received an answer from any party. 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 and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant defendant's Petition for Reconsideration, rescind the F&O, and substitute Findings of Fact that the application in ADJ18451814 was not duplicative of ADJ12117806; that applicant has not met his burden of establishing that the presumption of compensability available under section 5402(b) applies herein; that in ADJ18451814, QME Dr. Nerenberg was validly obtained, and that in ADJ18451814, discovery has not closed pursuant to section 5502(d).

FACTS

Applicant has filed multiple pending applications for adjudication.

In ADJ12619026, applicant claimed injury to his bilateral knees, bilateral hips, back, spine and neck while employed as an iron worker by Alamillo Rebar, insured by Old Republic Contractors Insurance Group (Old Republic) on October 1, 2014. Defendant denies the injury arose out of and occurred in the course of employment (AOE/COE).

In ADJ11779353, applicant sustained admitted injury to the right knee while employed on June 11, 2016, by Alamillo Rebar, insured by Old Republic. The claim was resolved by way of Stipulations with Request for Award, approved on December 19, 2018.

In ADJ12119320, applicant claimed injury to his back, spine, bilateral hips, bilateral lower extremities, and bilateral knees while employed as an iron worker by Alamillo Rebar, insured by Old Republic on June 11, 2016.

In ADJ12117806, applicant claimed injury to his head, neck, trunk, bilateral lower extremities, bilateral knees, back, spine, and bilateral hips while employed as an iron worker by defendant Alamillo Rebar, insured by Old Republic, from March 15, 2018 to March 15, 2019. Defendant denies injury AOE/COE.

In ADJ18451814, applicant claimed injury to his back, neck, spine, bilateral knees, head, headaches, and bilateral lower extremities, while employed as an iron worker by defendant Pacific Steel from February 5, 2019 to March 14, 2019. Defendant denies injury AOE/COE. The original application, dated November 7, 2023, listed Liberty Mutual as the carrier. However, applicant

amended the application on March 1, 2024 to correct the carrier to The Hartford. Applicant has further selected Dr. Nerenberg as the QME.

On March 7, 2024, the parties proceeded to trial in ADJ12116253, ADJ12117806, ADJ12619026, ADJ12119320, and ADJ11779353. The parties framed stipulations and issues in each case, and the WCJ ordered the matter continued to an additional trial date.

On July 10, 2024, the parties proceeded to trial in ADJ12117806 and ADJ18451814 and framed for decision the issues of whether the application in ADJ18451814 was a duplicative filing of ADJ12619026; whether applicant's claim in ADJ184518174 was presumptively compensable pursuant to section 5402; and whether the prior closure of discovery in ADJ12619026 invalidated the selection of Dr. Nerenberg as the QME with respect to ADJ18451814. The WCJ ordered the matter submitted for decision the same day.

On September 6, 2024, the WCJ ordered the submission vacated for additional development of the record.

On October 3, 2024, the parties appeared at trial and stipulated to submit ADJ12117806 and ADJ18451814 for decision. The same day, the WCJ issued his F&O, determining that the "filing of the Application of Adjudication in ADJ18451814 was not in violation of 8 CCR 10455 as a duplicative filing of ADJ12117806." (Finding of Fact No. 1.) The WCJ also determined that applicant's claim was not presumptively compensable pursuant to section 5402, and that Dr. Nerenberg was a validly selected QME. (Findings of Fact Nos. 2 & 3.) The WCJ ordered that the matter be set for MSC with respect to "information requested." (Order No. "d".)

On October 4, 2024, the WCJ issued an amended decision to reflect both employers in the caption but made no other substantive changes to the decision.

Defendant's Petition contends that applicant's claim in ADJ18451814 is duplicative of his claim in ADJ12117806 and must be dismissed pursuant to WCAB Rule 10455(a). Defendant asserts that case law provides a basis for the dismissal of applications, especially those filed solely to circumvent the rules regarding the closure of discovery. (Petition, at p. 2:11.) Defendant further seeks sanctions under section 5502(d) for applicant's alleged bad faith filings.

The WCJ's Report notes that the pre-trial conference statement filed by the parties on August 14, 2023 in relation to ADJ12116253, ADJ12117806, ADJ12619026, ADJ12119320, and ADJ11779353 did not address the issues in ADJ18451814, because the application had not yet been filed. Because the claims in ADJ18451814 and ADJ12117806 involved different dates of

injury, different body parts, a different employer and a different carrier, the WCJ recommends we deny reconsideration. (Report, at p. 4.)

DISCUSSION

I.

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.
>
> (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 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 4, 2024, and 60 days from the date of transmission is January 3, 2025. This decision is issued by or on January 3, 2025, so that we have timely acted on the petition as required by Labor Code 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 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 4, 2024, and the case was transmitted to the Appeals Board on November 4, 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 November 4, 2024.

II.

Defendant avers the appropriate procedure for appeal at this juncture is a petition for reconsideration because the WCJ's decision decided a threshold issue. (See Petition, p. 2, fn.1.) We agree.

A petition for reconsideration may properly be taken only 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 [260 Cal.Rptr. 76]; *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 [43 Cal.Comp.Cases 661]) 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 [97 Cal. Rptr. 2d 418, 65 Cal.Comp.Cases 650].) 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, but are not limited to, the following: 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 [210 Cal. Rptr. 3d 101, 81 Cal.Comp.Cases 1122].)

Here, as was the case in *Maranian v. Workers' Comp. Appeals Bd.*, *supra*, 81 Cal.App.4th 1068, the WCJ decided the threshold issue of whether applicant's claim was presumptively compensable under section 5402(b). Because the F&O determines a threshold issue, the WCJ's

decision is a "final order, decision or award" for purposes of sections 5900(a), 5902 and 5903, and defendant's petition was appropriately filed as one seeking reconsideration.

III.

Defendant contends that applicant's filing in ADJ18451814 is duplicative of his filing in ADJ2117806 and must be dismissed pursuant to WCAB Rule 10455(a), which provides, in relevant part:

> A separate Application for Adjudication of Claim shall be filed for each separate injury for which benefits are claimed. All applications shall conform to the following requirements:
>
> (a) Only one application shall be filed for each injury. Duplicative applications are subject to summary dismissal.

(Cal. Code. Regs., tit. 8, § 10455.)

Defendant argues that because the pleadings in ADJ12117806 and ADJ18451814 are substantially similar, our rule requires the dismissal of ADJ18451814. (Petition, at p. 6:18.) In support of its contention, defendant cites to *Garcia v. CKE Holdings* (May 26, 2021, ADJ11292762, ADJ11292764, ADJ12720128) [2021 Cal. Wrk. Comp. P.D. LEXIS 149] (*Garcia*), wherein a panel of the Appeals Board dismissed a duplicative application after determining that the evidence supported the existence of one cumulative injury, rather than two. (*Id.* at p. 9.)

We note, however, that WCAB Rule 10455(a) only provides that duplicative applications are *subject to* dismissal. Because our rule does not *mandate* dismissal, the determination is discretionary to the WCJ. Thus, the dismissal of an application requires both a determination by the WCJ or the Appeals Board that the underlying application is, in fact, duplicative of an existing application, and that the procedural history and case-specific facts warrant dismissal.

We further observe that applicant's burden of proof is to show that an injury arose out of and in the course of employment by way of substantial evidence, and as appropriate, that determination may require medical evidence. Contrary to defendant's contention, applicant is not required to establish injury AOE/COE at the pleading stage. As set forth in WCAB Rule 10517 (Cal. Code Regs., tit. 8, § 10517): "Pleadings shall be deemed amended to conform to the stipulations and statement of issues agreed to by the parties on the record. Pleadings may be

amended by the Workers' Compensation Appeals Board to conform to proof." Here, it may well be that the evidence in the case eventually establishes that the two filings were duplicative, but the decision to amend according to proof must be based on the evidentiary record and can be made by the WCJ upon submission of the issue of AOE/COE.

Here, the WCJ notes correctly that each application lists a different employer and carrier, that there is not complete overlap in the body parts, and that the periods alleged as injurious differ. (Report, at p. 3.) On this basis and given the pending medical-legal discovery in this matter, the WCJ has determined that applicant's pleadings in the alternative are permissible and merit a QME evaluation with respect to injury AOE/COE which remains denied at this time. Exercising the discretion afforded him under WCAB Rule 10455, the WCJ has declined to dismiss the application in ADJ18451814 and has further determined that QME Dr. Nerenberg was validly obtained. (Findings of Fact No. 1 & 3.) Following our independent review of the record occasioned by defendant's petition, we decline to disturb the WCJ's analysis and conclusions.

The parties also placed in issue whether the presumption of section 5402(b) would apply such that applicant's claim in ADJ18451814 is presumptively compensable. The WCJ's Opinion on Decision observes that the "claim was initially sent to the wrong carrier and the employer did not become aware of a claimed injury by an employee until January or February 2024," and that defendant's denial of the claim on March 5, 2024 was accomplished within 90 days of applicant's filing of a claim form. (Opinion on Decision, at p. 3.)

Section 5402(b) states that, "If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division." In *Honeywell v. Workers' Comp. Appeals Bd.* (*Wagner*) (2005) 35 Cal. 4th 24 [24 Cal. Rptr. 3d 179, 105 P.3d 544, 70 Cal. Comp. Cases 97], the California Supreme Court expressly rejected the argument that the 90-day period to accept or deny liability runs from the date employer *received notice of injury* or from the date of the *employer's breach of its duty* to provide a claim form. Rather, the Supreme Court held that the 90-day period runs from the date that an injured worker *files their claim form*, regardless of whether the employer complied with its statutory duty, unless the applicant can show that:

> (1) the employer, knowing the employee had suffered or was asserting an industrial injury, refused to provide a claim form, or misrepresented the availability of or the need for the employee to file a claim form; (2) the employee was actually misled into believing that no claim form was available or necessary

> and failed to file one for that reason; and (3) because of this reliance, the employee suffered some loss of benefits or setback as to the claim.
>
> (*Wagner, supra*, 35 Cal. 4th at p. 37.)

In this matter, we agree with the WCJ that the presumption of compensability afforded under section 5402 does not apply. In order for an alleged industrial injury to be presumed compensable pursuant to section 5402(b), the applicant must show when defendant received the DWC-1 claim form. Here, there is no evidence applicant ever filed a claim form with the employer, as required by sections 5401(c) and (d). In order to trigger the section 5402(b) presumption of compensability, use of the claim form is mandatory, and the filing of an application is not sufficient to trigger the presumption. As applicant has not demonstrated when the employer received the claim form, the presumption of compensability under section 5402(b) is not applicable. We note, however, that even without the presumption of compensability, applicant is still "free to prove in the ordinary manner his injury's industrial causation." (*Wagner, supra*, at p. 104.)

However, we observe that neither Finding of Fact No. 2, which purports to deny the presumption of section 5402(b), nor Finding of Fact No. 4, which states, "Closure of discovery" are findings of fact. Accordingly, we grant defendant's Petition for Reconsideration, rescind the F&O and substitute new Findings of Fact. Specifically, we substitute Finding of Fact No. 2, and find that applicant has not met his burden of establishing that the presumption available under section 5402(b) applies herein, and substitute Finding of Fact No. 4, to find that in ADJ18451814, discovery has not closed pursuant to section 5502(d). We substitute Finding of Fact No. 1 to find that the application in ADJ18451814 was not duplicative of ADJ12117806, and Finding of Fact No. 3 to find that Dr. Nerenberg is the appropriately obtained QME in ADJ18451814.

In addition, because the Findings of Fact address and resolve the issue framed by the parties in the July 10, 2024 Minutes of Hearing, we will rescind the WCJ's Orders in their entirety.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the decision of October 4, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of October 4, 2024 is **RESCINDED**, with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. The Application for Adjudication in ADJ18451814 was not duplicative of ADJ12117806.
2. Applicant has not met his burden of establishing that the presumption available under Labor Code section 5402(b) applies herein.
3. In Case No. ADJ18451814, Qualified Medical Evaluator Jeffrey Nerenberg, M.D., was validly obtained.
4. In Case No. ADJ18451814, discovery has not closed pursuant to Labor Code section 5502(d).

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

January 3, 2025

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

JOSE ROJAS
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC
KARLIN, HIURA & LaSOTA
MICHAEL SULLIVAN & ASSOCIATES

SAR/abs

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