Kobayashi

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JANICE HASLEY, ***Applicant,*** **vs.** **FRITO-LAY, INC.; ACE AMERICAN INSURANCE COMPANY, adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,** ***Defendants.***	**Case Nos. ADJ9860385** **ADJ9860124** **(Stockton District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

On February 23, 2017, we issued our Opinion and Order Granting the Petition for Reconsideration filed by applicant in order to allow sufficient opportunity to further study the factual and legal issues in this case and to enable us to issue a just and reasoned decision. This is our Opinion and Decision After Reconsideration.

Applicant sought reconsideration of the Joint Findings of Fact (FOF) issued by a workers' compensation administrative law judge (WCJ) on December 27, 2016[1] denying her request for an additional panel of Qualified Medical Evaluators[2].

Applicant contends that the FOF misapplies our decision in *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Bd. en banc), and also contravenes Labor Code[3] sections 4062.3(j) and 4064. Under the authorities cited above, applicant maintains her entitlement to a second panel QME to address a claim of cumulative trauma injury, which arose subsequent to her evaluation by Dr. Robert McIvor, the initial QME.

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[1] Our February 23, 2017 Opinion and Order Granting Reconsideration erroneously indicates the date of issuance of the FOF as December 26, 2016. The FOF was issued and served on December 27, 2016. By this reference we hereby correct the erroneous date listed in our Opinion and Order Granting Reconsideration.

[2] Qualified Medical Evaluator (QME) means a physician licensed by the appropriate licensing body for the state of California and appointed by the Administrative Director pursuant to Labor Code section 139.2. (See, Cal. Code Regs., tit. 8, § 1(z).)

[3] All statutory references are to the Labor Code unless otherwise indicated.

The WCJ has prepared a Joint Report and Recommendation on Petition for Reconsideration (Report). Although the WCJ stands by her decision denying applicant's request for a second QME panel, she acknowledges that the facts in this case "highlight an ambiguity in the holding of the en banc decision issued in *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418," and recommends that reconsideration be granted to allow for clarification of the holding in *Navarro, supra.* (Report, p. 2.)

Defendant has filed an Answer to applicant's Petition, recommending that we affirm the FOF. It is defendant's position that the WCJ correctly applied *Navarro* here because, contrary to applicant's assertion, there are not two distinct injury claims but, in fact, only one cumulative claim of injury as found by QME McIvor at the time of his evaluation of applicant on November 12, 2014.

We have reviewed the record in these matters, and have considered the arguments presented by applicant and defendant as well as the recommendations of the WCJ. For the reasons set forth in the following discussion, as our decision after reconsideration (removal), we will rescind the December 27, 2016 FOF and return this matter to the trial level for further development of the record, followed by determination as to the applicability of *Navarro* in view of those facts.

BACKGROUND

The record before us consists of stipulations and issues articulated by the respective parties and documentary evidence offered and admitted at the trial held on October 19, 2016. No testimony was presented. The deficiencies in the record require us to make assumptions about the underlying facts. For example, we surmise that applicant made a claim that she sustained an injury on April 8, 2014, arising out of and occurring in the course of her employment because on April 16, 2014, defendant sent applicant a document entitled, "Notice of Delay in Determining Liability for Workers' Compensation Benefits" (Notice, Exhibit 12.) The Notice is dated April 16, 2014 and references the date of injury as April 8, 2014. It states that defendant needs to obtain additional information to aid in its evaluation of the claim and that applicant also needs a QME to address whether her claim is work related. The record, however, provides no clarity on whether it was applicant who made a claim of injury and, if so, the manner in which such a claim was made. Was a claim form (DWC-1) actually filed? As will be

discussed in more detail below, the filing of a claim form is the pivotal issue underlying applicability of *Navarro*.

On July 2, 2014, defendant sent applicant a letter informing her that her claim of work-related injury occurring on April 8, 2014 is accepted. (Exhibit 1.) The letter advises applicant of her entitlement to medical treatment and other benefits. The letter encloses a medical mileage expense form for applicant's use in receiving compensation for her travel to and from medical treatment appointments. (*Id.*)

Applicant treated with Tracy Bigelow, D.O. In her report dated July 16, 2014, Dr. Bigelow states that she has provided treatment to applicant "regarding her right thumb CMC joint." (Exhibit 4.) Treatment in the form of a "cool comfort brace" is discussed, and it is noted that applicant's pain "currently is tolerable" and that "[s]he has continued to work full duty." (*Id.*, p. 1.) Dr. Bigelow diagnoses bilateral thumb CMC arthritis and bilateral thumb CMC pain with synovitis. She finds applicant permanent and stationary with no impairment, but does indicate the possibility of future physician visits and possibly surgery. (*Id.*, pp. 5-6.)

On August 14, 2014, defendant issued a Notice of Denial of Permanent Disability Benefits (Denial Notice, Exhibit 2.) The Denial Notice states, "Based on the medical report of Dr. Tracy Bigelow dated 07/16/2014, it appears that you have recovered from your injury with no permanent disability." (*Id.*, p. 1.) It also advises applicant of her right to disagree with Dr. Bigelow's findings about her permanent disability status and request a comprehensive medical evaluation by a panel QME.

Applicant responded to the Denial Notice by a handwritten letter dated August 22, 2014. (Exhibit 5.) Her letter states, "I Janice Hasley do not agree with Dr. Bigelow. I am requesting a QME. I do have a disability in both my thumbs." (*Id.*, p. 1.) She goes on to state, "I do not agree that this is age progressed, genetics, arthritis, tendonitis, brought on w/age. Thats (sic) a simple explanation to put a stamp on it. It's the jobs I've done for the last almost 25 yrs that has caused the breakdown in my thumbs." (*Id.*)

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The Division of Workers' Compensation's Medical Unit issued a three-member QME panel on September 15, 2014. (Exhibit 5.) Dr. Robert McIvor was ultimately selected as the QME to evaluate applicant's April 8, 2014 claim.

Dr. McIvor evaluated applicant on November 12, 2014 and issued a report on the same date. (Exhibit 10.) The history portion of the report states:

> This lady for the past 25 or so years has worked for the Frito-Lay plant in Modesto. She has done all variety of work including packaging, testing products and so for the first 15 years of her employment, it was mostly hard physical work, but now over the past 10 or so years she has been working as a performance coordinator which is mainly having to do with paperwork, computer operations, phone calls etc. She has actually had some degree of problems with her hands for the last several years but ended up reporting at (sic) as a workers compensation injury situation on April 14, 2014, actually she put the onset to April 8, 2013 but in fact this is a gradual long-term type problem which seems to have been worsening in recent years. (Exhibit 10, p. 2.)

Dr. McIvor diagnoses Bilateral CMC joint arthritis. He explains the basis of his diagnosis as follows:

> I think the main area of discussion would have to do with the cause for this problem, Dr. Bigelow thinks it's a degenerative process unrelated to work. I on the other hand, disagree with that position. This lady has done very hard physical work for at least 15 years for Frito-Lay and then considerable indoor work requiring pencils, writing, computers, phones, etc. for the past 10 years and up to the present. To be sure there may be some element of genetic predisposition or other such but looking at this lady's work history, it would appear to me that many of her tasks were hand intensive lifting, pushing, pulling, twisting, and so on which would exert considerable strain on the CMC joint and over a period of time it has simply broken down in both hands.
>
> So in my opinion this is an AOE/COE injury, cumulative trauma in type and of indefinite onset but at least most likely present over the past several years. (*Id.*, p. 3.)

Dr. McIvor finds applicant permanent and stationary with ratable impairment and no basis for apportionment. He also opines that applicant is in need of a provision for ongoing treatment. (*Id.*, p. 4.)

Dr. McIvor later issued three supplemental reports. In his report dated February 9, 2015, Dr. McIvor states, "I would not object to a 20% figure put on non-industrial activities including

housekeeping and other such duties and 80% to the stress of the job over the years but then dating back a year prior to April 8, 2014." (Exhibit 9, p. 1.) In his supplemental report dated April 21, 2015, Dr. McIvor affirms apportionment of permanent disability 80% to applicant's work and 20% "to the previous conditions she might have had for this problem ..." (Exhibit 8, p. 1.) In a further supplemental report dated June 3, 2015, Dr. McIvor confirms that applicant was permanent and stationary as of November 12, 2014, but notes that if she does have surgery "then she would be considered temporarily totally disabled subsequent to the surgery." (Exhibit 7, p. 1.)

Applicant retained counsel. On March 2, 2015, her attorney filed two Applications for Adjudication of Claim (Application[s]) on her behalf. Case number ADJ9860385 is a claim of specific injury on April 8, 2014 to the hand, fingers and upper extremities. Case number ADJ9860124 is a cumulative claim of injury through August 8, 2014 to the hand, fingers, and upper extremities.

On March 26, 2015, defendant denied applicant's specific injury claim of April 8, 2014. Defendant's notice of denial states, "... the medical evidence on file from Dr. Bigelow and PQME Dr. McIvor is consistent with a cumulative trauma injury and not a specific event." (Exhibit 11.)

Defendant filed Answers to both Applications on April 17, 2015. It denied applicant's specific claim of injury (ADJ9860385) and accepted applicant's cumulative injury claim (ADJ9860124), but disputed the nature and extent of that injury and the body parts injured.

On May 19, 2015, defendant issued a notice denying applicant's claim of injury to the upper extremities, low back, right knee, left shoulder, neck and hips, noting a lack of medical evidence to support a claim of injury to those body parts. (Exhibit 14.)

Applicant's attorney wrote to defendant on June 23, 2015, objecting to the opinions as set forth in Dr. Bigelow's report dated June 3, 2014. He proposes an AME and states, "[i]f we are unable to agree on one of the above physicians we will request a three-member panel of qualified medical evaluators and proceed accordingly." (Exhibit 13.)

Applicant then amended the Application in ADJ9860124 twice. On December 29, 2015, she amended it to include a claim of cumulative trauma injury to the ear and internal systems. On October

19, 2016, she amended it again to include a claim of cumulative injury to the low back, right knee, left shoulder, neck and hips.

On March 23, 2016, defendant filed a Declaration of Readiness to Proceed (DOR) with reference to both cases. The DOR requests that a status conference be scheduled and explains the basis for the request as follows:

> DR. MCIVOR IS THE PQME REQUESTED IN THE ORIGINAL SPECIFIC DOI 4/8/14. DR. MCIVOR OPINED THAT THIS INJURY IS ACTUALLY A CT 4/8/14. APPLICANT'S COUNSEL HAS OBTAINED A NEW PANEL IN PAIN MANAGEMENT WITH SUBSEQUENT REPLACEMENT PANELS AS IF THERE ARE 2 DATES OF INJURY WHEN THERE IS ONLY ONE AND MCIVOR IS THE PQME. THE BOARD'S ASSISTANCE IS REQUESTED ON THIS DISCOVERY ISSUE. (DOR, March 23, 2016.)

When the dispute could not be resolved at the Mandatory Settlement Conference held on April 12, 2016, a trial was held on October 19, 2016. No testimony was taken, but documentary evidence was admitted and the case was then submitted on the evidentiary record. The extent of the record before us includes the pleadings filed by the respective parties and 14 exhibits[4]. The FOF from which applicant now seeks reconsideration issued on December 27, 2016.

DISCUSSION

At the outset, we observe that applicant seeks reconsideration of the FOF. A Petition for Reconsideration, however, is properly taken only from a final order, decision or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order is defined as one "which 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]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered to be

[4] The 14 exhibits admitted into evidence include the permanent and stationary report of Dr. Bigelow, four reports from Dr. McIvor, six benefit notices, applicant's letter request for a QME, and applicant's attorney's letter to defendant proposing an AME with regard to her cumulative trauma claim.

"final" orders because they do not determine any substantive question or right. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650]; *Rymer, supra,* 211 Cal.App.3d at 1180; *Kaiser Foundation Hospitals, supra,* 82 Cal.App.3d at 45.)

Here, the FOF determined that applicant is not entitled to a separate QME panel for her cumulative trauma injury claim. That finding did not determine the underlying validity of applicant's claim or any other substantive right. Rather, it simply made an evidentiary ruling regarding the propriety of a second QME panel for applicant's cumulative trauma claim. Because the FOF is not a final order that determined a substantive right or liability of any party in the case, to the extent applicant's Petition seeks reconsideration of the FOF, it must be dismissed. (See, e.g., *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662; *Elwood v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 272 (writ den.).)

We will, however, treat applicant's Petition as seeking removal pursuant to Labor Code section 5310. 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]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the party seeking removal 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,* 136 Cal.App.4th at fn. 5; *Kleemann, supra,* 127 Cal.App.4th at 281, fn. 2.) Further, the party seeking removal must also demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to it ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).) The deficiencies in the record before us inhibit our ability to apply the principles enunciated in Navarro to the facts here. For that reason, we are compelled to grant removal, rescind the FOF, and return this matter to the trial level for further development of the record, followed by a decision thereon.

Applicant contends that the factual circumstances here are analogous to those in *Navarro, supra,* and compel a finding that she is entitled to a second QME panel to address disputes concerning her cumulative claim of injury. On the present record we are unable to make that determination.

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In *Navarro*, the applicant filed a claim form with an Application on February 12, 2009, claiming a cumulative trauma injury to his back and ear from February 9, 2008 to February 9, 2009. Over a year later, he filed two additional claim forms with two separate Applications alleging a specific injury on June 1, 2010 to his back, lower extremities, and legs, and another distinct specific claim of injury on August 31, 2010 to his back and left leg. (*Navarro, supra*, 79 Cal.Comp.Cases at pp. 420-421.) Defendant sought an order compelling an evaluation of applicant's two subsequent specific injury claims by the original panel QME who evaluated his cumulative trauma claim. (*Id.*) We analyzed the applicable Labor Code provisions[5] pertaining to the determination of medical issues and held that because each provision makes the date the claim form is filed with the employer the operative act, the date of filing the claim form determines which evaluator must consider which injury claim(s). (*Navarro,*

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[5] Labor Code sections 4060 through 4067. Germane to our discussion, Section 4060(c) states, in relevant part:

If a medical evaluation is required to determine compensability at any time *after the filing of the claim form*, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2. (Emphasis added.)

Section 4060(d) states, in relevant part:

If a medical evaluation is required to determine compensability at any time *after the claim form is filed*, and the employee is not represented by an attorney, the employer shall provide the employee with notice either that the employer requests a comprehensive medical evaluation to determine compensability or that the employer has not accepted liability and the employee may request a comprehensive medical evaluation to determine compensability. Either party may request a comprehensive medical evaluation to determine compensability. The evaluation shall be obtained only by the procedure provided in Section 4062.1. (Emphasis added.)

Section 4062.2(a) states:

Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury *or a claimed injury* occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section. (Emphasis added.)

Section 4062.3(j) states:

Upon completing a determination of the disputed medical issue, the medical evaluator shall summarize the medical findings on a form prescribed by the administrative director and shall serve the formal medical evaluation and the summary form on the employee and the employer. The medical evaluation shall address all contested medical issues *arising from all injuries reported on one or more claim forms* prior to the date of the employee's initial appointment with the medical evaluator. (Emphasis added.)

Section 4064(a) states:

The employer shall be liable for the cost of each reasonable and necessary comprehensive medical-legal evaluation obtained by the employee pursuant to Sections 4060, 4061, and 4062. Each comprehensive medical-legal evaluation shall address all contested medical issues arising *from all injuries reported on one or more claim forms*, except medical treatment recommendations, which are subject to utilization review as provided by Section 4610, and objections to utilization review determinations, which are subject to independent medical review as provided by Section 4610.5. (Emphasis added.)

supra, 79 Cal.Comp.Cases at p. 424.) Using the date that Navarro filed the respective claim forms in each case as the operative date of these statutory provisions, we concluded that the Labor Code generally requires the employee to return to the original QME when a new medical issue arises in the same claim of injury or when the employee reopens the same claim of injury. But, in the case of subsequently filed claim(s) of injury, we concluded that the Labor Code does not require an employee to return to the same QME for a subsequent claim(s) of injury. (*Navarro, supra*, 79 Cal.Comp.Cases 418, 425.)

In this case, applicant *apparently* claimed a specific injury to her thumbs occurring on April 8, 2014. We use the word, apparently, because absent a copy of a claim form, we have no verifiable information as to the exact nature of the claim. We do note that Exhibit 3, applicant's hand-written objection to the opinions of Dr. Bigelow, states her belief that work activities she performed over a 25 year period "caused the breakdown in my thumbs." (Exhibit 3, p. 1.) Defendant's acceptance letter, however, appears to accept a specific injury with the injury date of April 8, 2014. (Exhibit 1.)

Medical treatment was provided and Dr. Bigelow served as applicant's primary treating physician. Dr. Bigelow's July 16, 2014 Permanent and Stationary Evaluation states that she is treating applicant "regarding her right thumb CMC joint," but provides no elaboration on the exact nature of the right thumb injury. (Exhibit 4, p. 1.) Dr. Bigelow diagnoses bilateral thumb CMC arthritis and pain with synovitis, but she does not discuss any work component, specific, cumulative or both, and its impact on her diagnosis. Dr. Bigelow concludes that applicant is permanent and stationary with no impairment. She states, "[t]he patient is performing usual and customary job duties without difficulty. Job change or job modification is not necessary." (*Id.*, p. 6.) Defendant accepted Dr. Bigelow's findings, stating, "[b]ased on the medical report of Dr. Tracy Bigelow dated 07/16/2014, it appears that you have recovered from your injury with no permanent disability ...." (Exhibit 2, p. 1.)

Applicant did not agree with Dr. Bigelow's assessment and requested an evaluation by a panel QME. Ultimately, Dr. McIvor was selected as the panel QME. In his report dated November 12, 2014, Dr. McIvor discusses the fact that applicant "put the onset" of her thumb injury as April 8, 2014, but notes, "[s]he actually had some degree of problems with her hands for the last several years ...."

(Exhibit 10, p. 2.) He then characterizes the claim as "an AOE/COE injury, cumulative trauma in type and of indefinite onset but at least most likely present over the past several years." (*Id.*, p. 3.)

Following Dr. McIvor's evaluation, applicant retained an attorney who filed two Applications on her behalf: a specific injury claim of injury on April 8, 2014 and a cumulative trauma claim of injury through April 8, 2014. Whether applicant also filed claim forms to report these injury claims is unknown. The record does not include copies of claim forms. After the Applications were filed, applicant requested a second, separate QME panel on the basis that the cumulative trauma Application is a subsequently reported claim.

Defendant urges us to affirm the WCJ, arguing that there is only one date of injury in this case and that is the cumulative injury found by Dr. McIvor at the time of his evaluation of applicant's specific injury claim on November 12, 2014. Defendant points out that although Dr. McIvor was asked to evaluate a specific April 8, 2014 injury to applicant's hands, he concluded that the injury claim "...is an AOE/COE injury, cumulative trauma in type and of indefinite onset but at least most likely present over the past several years." (Exhibit 10, p. 3.) Thus, defendant urges us to conclude that applicant only sustained one industrial injury—a cumulative trauma—and Dr. McIvor is the properly selected QME on that claim.

On the record before us, we are not able to reach a definitive conclusion as to whether defendant's position has merit or *Navarro* applies to require a second QME panel. The questions that must first be resolved are whether and when claim forms were filed with regard to these injury claims, and if so, what was the nature of the injury(s) claimed. If no claim forms were filed, then *Navarro* does not apply and normally the parties would return to the original evaluator. (4062.3(k).) If claim forms were filed, then *Navarro* would control the determination. Upon further development of the record (See, *Raymond Plastering v. Workers' Comp. Appeals Bd.* (1967) 252 Cal.App.2d 748, 753 [32 Cal.Comp.Cases 287]), the Labor Code provisions discussed above and reviewed in *Navarro*, will determine the result. Accordingly, as our Decision After Removal, we will return these cases to the trial level for further development of the record, such further proceedings as may be required, and for a decision thereon.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that applicant's Petition for Reconsideration of the December 27, 2016 Findings of Fact is **DISMISSED**, but is hereby deemed to be a Petition for Removal.

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IT IS FURTHER ORDERED that as our Decision After Reconsideration, applicant's Petition for Removal is **GRANTED**; the Findings of Fact issued herein on December 27, 2016 is **RESCINDED**; and these cases are **RETURNED** to the trial level for further development of the record, such further proceedings as may be required, and for decision thereon.

WORKERS' COMPENSATION APPEALS BOARD

I CONCUR,

FRANK M. BRASS

MARGUERITE SWEENEY

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 27 2017

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

D'ANDRE PETERSON BOBUS & ROSENBERG
JANICE HASLEY
LAW OFFICES OF GUY ALLEN MEDFORD

SVH/ara

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JANICE HASLEY, ***Applicant,*** **vs.** **FRITO-LAY, INC.; ACE AMERICAN INSURANCE COMPANY, adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,** ***Defendants.***	**Case No. ADJ9860385** **ADJ9860124** **(Stockton District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by applicant with regard to the decision filed on December 26, 2016.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that Reconsideration is **GRANTED**.

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IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall ***not*** be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board, and shall ***not*** be e-filed in the Electronic Adjudication Management System (EAMS). Any documents relating to the petition for reconsideration lodged in violation of this order shall neither be accepted for filing nor deemed filed.

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All trial level documents not related to the petition for reconsideration shall continue to be e-filed through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper form.[1] If, however, a proposed settlement is being filed, the petitioner for reconsideration should promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR,

MARGUERITE SWEENEY

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 23 2017

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

JANICE HASLEY
LAW OFFICES OF GUY ALLEN MEDFORD
D' ANDRE LAW

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[1] Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements, etc.)

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

CASE NUMBER: ADJ9860124
ADJ9860385

JANICE HASLEY	**-vs.-**	**FRITO-LAY, INC.; ACE AMERICAN INSURANCE COMPANY, adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,**
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:		**Anne J. Horelly**
DATE:		**January 18, 2017**

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Janice Hasley, through her attorney of record, Law Offices of Guy Allen Medford, has filed a timely verified petition for reconsideration of the Joint Findings of Fact dated December 27, 2016.[1] The petition alleges that the undersigned acted without or in excess of her authority; that the decision was procured by fraud; that the evidence does not justify the findings of fact; and, that the findings of fact do not support the Order, Decision or Award. Although the petition raises all statutory grounds available, the essence of the petition is that the court applied the wrong law or applied the correct law incorrectly in determining whether applicant was entitled to a second panel of qualified medical evaluators (QME). Applicant contends she is entitled to a new panel because only one injury was at issue when the QME evaluated her. The court found applicant is not entitled to a second panel as she sustained only one injury, even though her injury was initially identified by a

[1] The Petition for Reconsideration incorrectly states that the Findings of Fact issued on December 26, 2016.

single date and the application for the cumulative trauma injury was filed after the QME evaluation for the specific injury.

Defendant has filed an Answer requesting that the court be affirmed. As this case highlights an ambiguity in the holding of the en banc decision issued in *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418, the court recommends reconsideration be granted to allow for clarification of this important issue to the community.

STATEMENT OF FACTS

Applicant reported an injury arising out of and occurring during the course of her employment. The employer accepted the claim and provided benefits. The date of injury for the claim was recorded as April 8, 2014.

Applicant received treatment from Tracy Bigelow, D.O. After completion of treatment, Dr. Bigelow found the applicant permanent and stationary on July 16, 2014. Applicant disputed the level of impairment found by the treating physician. A panel of Qualified Medical Evaluators was obtained. Applicant was evaluated by Robert R. McIvor, M.D. Doctor McIvor issued a report wherein he opined that applicant's injury was the result of cumulative trauma not a specific event.

Applicant retained counsel. On March 2, 2015, Counsel filed two Applications for Adjudication of Claim; one alleging a cumulative trauma injury and the second alleging a specific injury. Answers were filed on behalf of the carrier wherein the specific injury was denied based upon the opinion of Dr. McIvor and the cumulative trauma injury was accepted.

On June 23, 2015, counsel for the applicant issued an untimely objection to the June 3, 2014 report of Dr. Bigelow and indicated that applicant needed to be evaluated by an Agreed Medical Evaluator (AME) or Qualified Medical Evaluator (QME). Defendant declined asserting that applicant had already been evaluated by a QME. Eventually, the matter proceeded to trial and was

submitted on the issue of whether the filing of the second application gave applicant the right to a second panel. The court found that it did not under the circumstances of this case. The petition for reconsideration followed.

DISCUSSION

Applicant contends that the filing of a claim form is the operative act in determining what injuries are to be evaluated by a Qualified Medical Evaluator. Applicant further contends that when no claim form is filed, the provisions of Labor Code section 4062.3(j) do not apply. Finally, Applicant contends that *Navarro* clearly requires the issuance of a new QME panel for evaluation of the cumulative trauma injury found by the Qualified Medical Evaluator who evaluated applicant after she disputed the treating doctor's opinion on permanent disability.

The court acknowledges that Labor Code section 4062.3(j), Labor Code section 4064(a) and *Navarro* all discuss the filing of a claim form as the operative act that determines what injuries will be evaluated by a QME. The court disagrees with *Navarro* to the extent that the case suggests a claim form must be filed to obtain a medical-legal evaluation. Ms. Hasley's employer did not provide applicant with a claim form after Dr. McIvor opined that applicant suffered a cumulative trauma injury not a specific injury. Instead, the employer continued to administer benefits for the injury which was initially identified by a single date. Applicant did not obtain and file a claim form with her employer. Instead, Applicant filed an Application for Adjudication of Claim (Application) alleging a cumulative trauma injury. If a claim form must be filed in order to obtain a medical-legal evaluation, then applicant is not entitled to a new panel as no claim form has been filed.

Applicant contends that she is entitled to a new QME because the cumulative trauma injury was "not in existence" at the time of the initial QME examination. She is not. The application filed for the specific injury alleges the injury occurred as follows: "day hand started hurting." There is no

specific event that occurred on April 8, 2014. While applicant has filed two applications, she has suffered only one injury. She is entitled to only one QME and must return to that QME for parts of body added to the claim after the initial QME evaluation.

CONCLUSION

The court believes that the result in this case is consistent with Labor Code section 4062.2(j), Labor Code section 4064(a) and the holding in *Navarro* except to the extent that *Navarro* seems to suggest that the filing of a claim form is required to obtain a medical-legal evaluation. Applicant contends that Labor Code section 4062(j), Labor Code section 4064(a) and the holding in *Navarro* "clearly" require the opposite result. The court recommends that reconsideration be granted to allow for clarification of this important issue to the community and that the Joint Findings of Fact be affirmed.

DATE: January 18, 2017

Anne J. Horolly
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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

LAW OFFICES OF GUY ALLEN MEDFORD
JANICE HASLEY
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.
D'ANDRE, PETERSON, BOBUS & ROSENBERG, LLP