WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEFFREY HORDWEDEL, ***Applicant,*** **vs.** **COUNTY OF LOS ANGELES, Permissibly Self-Insured,** ***Defendant.***	**Case No. ADJ8796181** **(Van Nuys District Office)** **OPINION AND ORDERS DISMISSING PETITION FOR RECONSIDERATION, GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL**

Applicant seeks removal of the case to the Appeals Board or reconsideration of the July 12, 2013 Order Denying Petition (Order) of the workers' compensation administrative law judge (WCJ) who denied applicant's July 10, 2013 "Petition To Strike IME Medical-Legal Report of Susan Goodlerner, M.D." (Petition) without a hearing, on the sole grounds that "improper procedure followed for filing for review of the action sought by petitioner."[1]

Applicant claims to have incurred industrial injury to numerous body parts while employed by the County of Los Angeles as a Fire Captain during the period December 7, 1977 to November 14, 2012. His claim is subject to the March, 2012 Labor-Management Workers' Compensation Dispute Resolution Agreement Between County Of Los Angeles And Los Angeles County International Association Of Firefighters (Agreement), which he contends was created pursuant to Labor Code section 3201.7(a)(3)(C).[2]

Applicant contends that the WCJ should have acted on the merits of his July 10, 2013 Petition

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[1] Quotations converted from upper case. Applicant's Petition is dated as of its filing date as shown by the clerk's date stamp. "IME" refers to "Independent Medical Examiner."

[2] Further statutory references are to the Labor Code. Section 3201.7(a)(3)(C) requires WCAB and judicial recognition of any labor-management agreement that provides for, "The use of an agreed, limited list of qualified medical evaluators and agreed medical evaluators that may be the exclusive source of qualified medical evaluators and agreed medical evaluators under this division." (But see footnote 4, *infra*, page 5.)

because the Agreement does not include a process for addressing individual claims like the one raised in his Petition.

An answer was received from defendant, who contends that applicant's Petition should be addressed in the first instance by the Labor Management Committee (LMC) established by the Agreement. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that both removal and reconsideration be denied.

Applicant filed a "Request To File A Supplemental Petition" to respond to defendant's answer and the Report. Applicant's request to file a supplemental petition is denied because the current record is sufficient to apprise us of the issues, and because he will have the opportunity to be heard at the hearing that is to be conducted regarding the scope of the Agreement and role of the LMC following return of the case to the trial level, as discussed below. (Cal. Code Regs., tit. 8, § 10848.)[3]

The petition for reconsideration is dismissed because it is only available to challenge a final order, decision or award that determines a substantive right or liability of those involved in the case, and is not available to challenge interim orders like the WCJ's July 12, 2013 Order in this case. (Lab. Code, § 5900; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650].)

Removal is granted because the WCJ's July 12, 2013 Order may lead to significant prejudice by delaying the resolution of important issues in this and other cases that are subject to the Agreement and because reconsideration will not be an adequate remedy after the issuance of a final decision by the WCJ on the substance of applicant's workers' compensation claim. (Lab. Code, § 5310; Cal. Code Regs., tit. 8, §10843(b); *Kleemann v Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 224, footnote 2 [70 Cal.Comp.Cases 133]; *Swedlow, Inc. v. Workers' Comp. Appeals Bd.* (*Smith*) (1983) 48 Cal.Comp.Cases

[3] Rule 10848 provides as follows: "When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party."

476 [writ den.].)

As our Decision After Removal the WCJ's July 12, 2013 Order is rescinded, and the case is returned to the trial level for further proceedings and a new decision by the WCJ. In light of the differing views of the parties regarding the scope of the Agreement and role of the LMC, a complete record concerning those issues should be developed. If it is determined by the WCJ after a hearing that the LMC should consider applicant's Petition in the first instance, the WCJ should issue findings and a decision to that effect. If it is determined by the WCJ that the WCAB should act on applicant's July 10, 2013 Petition in the first instance, the record on the merits of the Petition should be developed at a hearing and the WCJ should then issue findings and a decision concerning the Petition.

BACKGROUND

Applicant worked for defendant as a firefighter and Fire Captain for many years and he claims to have incurred cumulative industrial injury to several body parts while in that employ. His workers' compensation claim is subject to the provisions of the Agreement, which provides a partial "carve out" from the regular procedures of the workers' compensation statute. (See Lab. Code, §§ 3201.5 et seq.) In particular, the Agreement provides for the selection of an Independent Medical Examiner (IME) from a list approved by the parties, and in Article IV, sections L and M sets forth the following provisions concerning communications with the selected IME:

> "L. All communications with the IME shall be in writing and shall be served on the opposing party. This provision does not apply to oral or written communications by the employee in the course of the examination or at the request of the evaluator in connection with the examination, or at the request of the parties seeking report, compensability or disability status.
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> "M. Ex parte communication with the IME is prohibited. If a party communicates with the IME in violation of subdivision L, the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from the next IME chosen from the list pursuant to provision G.4. If a new examination is required, the party making the communication prohibited by this section shall be liable for the cost of the initial medical evaluation."

In his July 10, 2013 Petition, applicant alleges that defendant engaged in prohibited ex parte communication with Dr. Goodlerner whose name was drawn from the IME list created pursuant to the Agreement. Applicant contends that under Article IV, sections L and M of the Agreement, defendant's

ex parte communication with Dr. Goodlerner requires that her report not be received into evidence, and requires that the next physician on the IME list be selected to provide a new report. Applicant further contends that the Agreement does not have a process for addressing his Petition, and that it is properly presented to the WCAB for determination on the merits.

Defendant answers that there was no improper ex parte communication with Dr. Goodlerner, that applicant should take the physician's deposition regarding the alleged ex parte communication, and should then present any claim that her report should be stricken to the LMC for determination.

The WCJ addresses the differing views of applicant and defendant in his Report by relying upon his construction of the Agreement, writing in pertinent part as follows:

> "Based upon a review of the Carve-Out agreement, applicant has not followed the procedures in the agreement as it states that parties agreed that under 'F', of the attached agreement, that the parties agreed that a Labor-Management Committee ('LMC') shall be established to address issues of interpretation in the implementation of this Agreement; selecting a reviewing IME panel(s) physicians; and other mutually agreeable issues....Further, under the Labor Code, the remedy for the petitioning party is not to appeal to a workers' compensation judge, however, after a decision is made presumably by the Labor Management Committee [it] would go to the Appeals Board as if it had been a determination by a workers' compensation judge and a petition for reconsideration."

DISCUSSION

The different understanding of the parties regarding the scope of the Agreement and the role of the LMC flows from their differing views of the meaning of its provisions. Article I of the Agreement describes its general purpose as expediting the resolution of medical disputes and provision of medical treatment, and in Article I, paragraph 4 it is explained that those purposes are to be achieved, "by utilizing an exclusive list of medical providers to be the sole and exclusive source of medical evaluations for disputed issues surrounding covered employees in accordance with Labor Code section 3201.7(c) [*sic*]."[4]

[4] Section 3201.7(c) describes limits on the application of section 3201.7(a), and there is no apparent reason it is cited in Article I, paragraph 4, or in Article III, paragraph 4 of the Agreement. From those contexts, it appears the parties may have intended to cite section 3201.7(a)(3)(C), which refers to the establishment of an exclusive list of providers to be used for dispute resolution as is described in those provisions of the Agreement. (See footnote 2, *supra*, page 1).

Article II of the Agreement notes that it "governs a pilot program."

Article III, section C, describes the scope of the Agreement, as follows:

> "This Agreement *is restricted to establishing an exclusive list* of medical providers to be used for medical dispute resolution for the above-covered employees *in accordance with Labor Code Section 3201.7(c)* [*sic*]."[5] (Emphasis added.)

Article IV of the Agreement discusses the distinction between medical providers and IMEs, the use of IMEs and their relationship to the utilization review process, and how the IME process is to work. The role of the LMC is described in Article IV section F, as follows:

> "The parties agree that a Labor-Management Committee ('LMC') shall be established *to address issues of interpretation in the implementation of this Agreement; selecting and reviewing IME panel(s) physicians; and other mutually agreeable issues*. This committee shall be comprised of three (3) members of management and three (3) members of labor as selected by the Local 1014 president." (Emphasis added.)

From our review, it appears that the purpose of the Agreement is to establish a jointly agreed list of medical examiners to be used to address workers' compensation claims filed by individuals covered by the Agreement. While the Agreement empowers the LMC to address issues of "interpretation in the implementation" of the Agreement, the document does not clearly describe a specific process for addressing individual disputes, like applicant's claim in this case that the reporting of Dr. Goodlerner should be excluded because of improper ex parte contact by defendant.

In order to assure that the process issue raised by applicant's Petition is properly addressed, we conclude that the WCJ should conduct a hearing to allow the parties in this case, with notice to the parties to the Agreement, to present their respective arguments and evidence regarding the proper construction of the scope of the Agreement and the role of the LMC. Conducting a hearing to determine whether applicant's Petition should be heard in the first instance by the LMC or by the WCAB is consistent with the holdings in cases that recognize the WCAB's jurisdiction to determine if it is the

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[5] See footnote 4, *supra*, page 4.

proper forum to adjudicate a claim. (See *Scott v. Industrial Acc. Com.* (1956) 46 Cal.2d 76 [21 Cal.Comp.Cases 55]; *La Jolla Beach & Tennis Club v. Industrial Indem. Co.* (1994) 9 Cal.4th 27 [59 Cal.Comp.Cases 1002].)

If it is found by the WCJ after a hearing that under the Agreement applicant must first present his issue concerning the alleged ex parte contact with Dr. Goodlerner to the LMC, the WCJ should issue findings and an order to that effect.

If it is determined by the WCJ after a hearing that the Agreement does not provide for the LMC to adjudicate applicant's July 10, 2013 Petition, the substantive merits of the Petition should be further addressed by the WCJ at a hearing to develop the record on applicant's contentions. Thereafter, the WCJ should issue findings and a decision on whether the challenged report should be excluded from evidence and a new IME obtained under the Agreement to provide an evaluation and report.

For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the July 12, 2013 Order Denying Petition of the workers' compensation administrative law judge is **DISMISSED**.

IT IS FURTHER ORDERED that applicant's petition for removal of the case to the Appeals Board is **GRANTED**.

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IT IS FURTHER ORDERED as the Decision After Removal of the Appeals Board that the July 12, 2013 Order Denying Petition of the workers' compensation administrative law judge is **RESCINDED** and the case is **RETURNED** to the trial level for further proceedings and a new decision by the workers' compensation administrative law judge in accordance with this decision.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

FRANK M. BRASS

DEIDRA E. LOWE

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SEP 20 2013

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

JEFFREY HORDWEDEL
STRAUSSNER, SHERMAN
LOS ANGELES COUNTY COUNSEL
LOS ANGELES COUNTY FIRE DEPT., ATTN: RETURN TO WORK SECTION MANAGER
LOCAL 1014 PRESIDENT

JFS/abs