WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KATHY WARD, ***Applicant,*** **vs.** **CITY OF DESERT HOT SPRINGS; permissibly self-insured and administered by HAZELRIGG RISK MANAGEMENT SERVICES,** ***Defendant.***	**Case No. RIV 0069499** **OPINION AND DECISION AFTER RECONSIDERATION AND ORDER DENYING REMOVAL**

On July 31, 2006, we granted defendant's petition for reconsideration or, in the alternative, petition for removal of the Findings and Order of May 5, 2006, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part: (1) that applicant claims to have sustained industrial injury to her psyche and in the form of various internal conditions from June 8, 2000, through June 8, 2005, while employed by defendant as a development services manager; and (2) that medical reports regarding the compensability of applicant's psychiatric and internal injury claims must be obtained through the procedures established by Labor Code sections 4060 and 4062.2; therefore, defendant is not entitled to obtain a medical evaluation of applicant pursuant to Labor Code section 4064(d).[1]

Defendant contends that it is entitled to a medical evaluation of applicant under section 4064(d), arguing that the amendments to section 4060, together with the enactment of section 4062.2, did not eliminate the right of either party to obtain at its own expense an admissible medical report from an evaluation obtained pursuant to section 4064(d). Applicant did not file an answer to defendant's petition, however, the WCJ prepared a Report and Recommendation (Report) suggesting that defendant's petition be dismissed, to the extent it seeks reconsideration,

[1] All further statutory references are to the Labor Code.

and that it be denied, to the extent it seeks removal.

For the reasons set forth in the WCJ's Report, which we adopt and incorporate by reference, and for the following reasons, we hold that for claimed industrial injuries occurring on or after January 1, 2005, in which the employee is represented by an attorney: (1) pursuant to section 4060(c), medical disputes regarding the compensability of the alleged industrial injury must be resolved solely by the procedure provided in section 4062.2; and (2) an evaluation regarding compensability may not be obtained pursuant to section 4064(d) – and, if obtained, it is not admissible.

Therefore, the Order of May 5, 2006, properly denied defendant's request to compel applicant's examination pursuant to section 4064(d). Accordingly, we will vacate our Order Granting Reconsideration of July 31, 2006, dismiss defendant's petition for reconsideration, as the disputed order is not a final order from which reconsideration may properly be sought, and deny removal.

Background

Applicant claims to have sustained cumulative psychiatric and internal injury while employed as a development services manager by defendant from June 8, 2000, through June 8, 2005.

Defendant denied liability for the alleged industrial injury. On or about November 4, 2005, defendant arranged for applicant to be examined by Stuart Meisner, Ph.D. Applicant, through her counsel, refused to be examined by Dr. Meisner, asserting that the examination was impermissible pursuant to sections 4060 and 4062.2. Defendant sought to compel applicant's examination with Dr. Meisner and, on April 25, 2006, the parties proceeded to trial regarding the issue of whether defendant is entitled to obtain, and therefore compel, applicant's medical evaluation pursuant to section 4064(d).

On May 5, 2006, the WCJ issued the Findings and Order of which defendant sought reconsideration or, in the alternative, from which it seeks removal. In the Opinion on Decision, the WCJ explained, in relevant part, that, in cases in which the worker is represented, section 4060

allows an examination regarding the compensability of an alleged injury occurring on or after January 1, 2005, to be obtained only by the procedure set forth in section 4062.2 and that defendant "cannot circumvent" section 4060 and section 4062.2 by scheduling an examination pursuant to section 4064(d).

Discussion

Section 4060 applies to "disputes over the compensability of any injury." Subsection (c) of section 4060, as amended pursuant to Senate Bill (SB) 899 (Stats. 2004, ch. 34, § 34), provides as follows:

> "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*." (Italics added.)

In turn, section 4062.2(a), as adopted by SB 899 (Stats. 2004, ch. 34, § 18), provides as follows:

> "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*." (Italics added.)

Section 4062.2 then goes on to provide that, in represented cases involving injuries on or after January 1, 2005, the parties shall either select an agreed medical examiner (AME) or select a qualified medical examiner (QME) from a three-member panel.

Accordingly, because sections 4060(c) and 4062.2(a) state that medical evaluations "shall be obtained only" by the procedure they specify, it appears the Legislature intended that this procedure be the exclusive method for obtaining medical evaluations on compensability. In this regard, we observe that "shall" is mandatory language. (Lab. Code, § 15; see also, *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357; *Jones v. Tracy School Dist*. (1980) 27 Cal.3d 99, 109; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907 [42 Cal. Comp. Cases 131].) Moreover, in the context of sections 4060(c) and 4062.2(a), the word "only" denotes a restriction

or limitation. (See Funk & Wagnalls Standard College Dictionary (1974), p. 944 (defining "only" to mean "[i]n one manner" and "[s]olely; exclusively").)

Section 4064(d), provides in relevant part:

> "[N]o party is prohibited from obtaining any medical evaluation or consultation at the party's own expense. In no event shall an employer or employee be liable for an evaluation obtained in violation of subdivision (b) of Section 4060. All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in subdivisions (d) and (m) of Section 4061 and subdivisions (b) and (e) of Section 4062."

Prior to its amendment by SB 899, former section 4060(c) also allowed any party to "obtain additional reports at their own expense." However, that provision was deleted from section 4060(c) by SB 899 and was replaced with the current reference to the procedure requiring, in cases involving a represented employee, that "a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2."

However, section 4064 was not amended by SB 899. Thus, if there is an irreconcilable conflict between section 4064(d), on the one hand, and sections 4060 and 4062.2, on the other, then the latter statutes prevail as the more recently amended and enacted. (Cf. *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42]; *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 505 [54 Cal.Comp.Cases 160].) Here, the language of section 4064(d), allowing a party to obtain a medical evaluation or consultation at its own expense, cannot be harmonized either with SB 899's deletion of the language of former section 4060(c), which had permitted parties to obtain a additional examinations at their own expense, or with SB 899's inclusion of language in current sections 4060(c) and 4062.2(d) that medical evaluations "shall be obtained only" by the procedure they specify. Accordingly, sections 4060(c) and 4062.2(d), as the most recently enacted or amended statutes, control over section 4064(d).

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Moreover, an interpretation that section 4064(d) cannot be used to circumvent the

QME/AME procedures of sections 4060(c) and 4062.2(a) is consistent with recent Court of Appeal decisions rejecting other attempts to circumvent the former QME/AME statutes. (*Nunez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 584, 594 [71 Cal.Comp.Cases 161] (section 4050 may not be used to circumvent former section 4060 et seq.); *Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596 [71 Cal.Comp.Cases 155] (neither section 4050 nor section 5701 may be used to circumvent former section 4060 et seq.); see also, *Regents of the Univ. of Cal. v. Workers' Comp. Appeals Bd*. (*Ford*) (1995) 60 Cal.Comp.Cases 1246 (writ den.).)

Therefore, for claimed industrial injuries occurring on or after January 1, 2005, in which the worker is represented by an attorney, we hold that disputes regarding the compensability of the alleged industrial injury must be resolved, pursuant to section 4060(c), by the procedure provided in section 4062.2 and that an evaluation regarding compensability may not be obtained pursuant to section 4064 – and, if a report is obtained, it is not admissible.

Consistent with this holding, we conclude that the WCJ's Order denying defendant's request to compel applicant to undergo a medical evaluation pursuant to section 4064(d) was proper. A defendant cannot compel an applicant to attend a medical evaluation that would violate the provisions of sections 4060(c) and 4062.2 and that would generate an inadmissible medical report. (Cf. *Cortez v. Workers' Comp. Appeals Bd.*, *supra*, 136 Cal.App.4th at p. 602 [71 Cal.Comp.Cases at p. 160].)

Accordingly, we will vacate our prior Order Granting Reconsideration and dismiss defendant's petition for reconsideration, as the Order of May 5, 2006, is not a final order. (Lab. Code, § 5900; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661].) Moreover, we will deny defendant's alternative request for removal, as the WCJ properly resolved the apparent conflict between sections 4060, 4062.2, and 4064.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Order Granting Reconsideration of July 31, 2006, is hereby **VACATED**.

IT IS FURTHER ORDERED that defendant's petition for reconsideration of the Findings and Order of May 5, 2006, is hereby **DISMISSED**.

IT IS FURTHER ORDERED that defendant's petition for removal from the Findings and Order of May 5, 2006, is hereby **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ James C. Cuneo

I CONCUR.

/s/ Merle C. Rabine

/s/ Ronnie G. Caplane

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

9/25/06
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