WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TSEGAY MESSELE, ***Applicant,*** **vs.** **PITCO FOODS, INC.; CALIFORNIA INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ7232076** **OPINION AND ORDER GRANTING RECONSIDERATION ON APPEALS BOARD MOTION; NOTICE OF INTENTION TO MODIFY SEPTEMBER 26, 2011 OPINION AND DECISION AFTER RECONSIDERATION, ORDER GRANTING REMOVAL, AND DECISION AFTER REMOVAL; AND ORDER CORRECTING CLERICAL ERROR (EN BANC)**

For the reasons set forth below, we grant reconsideration on Appeals Board motion under Labor Code section 5911[1] and issue this notice of intention.

On September 26, 2011, we issued an en banc decision in this case, resolving questions associated with the timeline set forth in section 4062.2(b) for selecting an agreed medical evaluator (AME) and requesting a panel qualified medical evaluator (QME). We held,

> "(1) when the first written AME proposal is ‚made" by mail or by any method other than personal service, the period for seeking agreement on an AME under Labor Code section 4062.2(b) is extended five calendar days if the physical address of the party being served with the first written proposal is within California; and (2) the time period set forth in Labor Code section 4062.2(b) for seeking agreement on an AME starts with the day after the date of the first written proposal and includes the last day." (*Messele v. Pitco Foods, Inc*., 76 Cal.Comp.Cases 956, 958 (Appeals Board en banc).) (Footnotes omitted.)

Our intention in issuing the September 26, 2011 decision was to clarify the existing law on issues not previously addressed in a binding Appeals Board decision and to prevent inconsistencies in rulings

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

by WCJs and Appeals Board panels.[2] It was not our intention to throw into uncertainty the validity of QME panels previously obtained in ongoing workers" compensation proceedings or to allow parties, based on our decision, to challenge the timeliness of a panel request or the validity of panels to which they had not previously objected solely because, after the fact, they were displeased with the make-up of the panel or, worse, because the resulting QME evaluation produced a report unfavorable to their client. It was also not our intention to allow reopening of any orders, decisions, or awards based on our decision. (See Lab. Code, §§ 5803, 5804.)

It has come to our attention that our September 26, 2011 decision, while resolving some of the issues relating to the timing of QME panel requests, has created confusion about the status of many ongoing proceedings. The Division of Workers" Compensation (DWC) has issued DWC Newsline No. 46-11 to attempt to manage some of the confusion arising from application of our decision to ongoing cases.[3] In a letter addressed to Chairman Miller from William Herreras of the California Applicants" Attorneys Association (CAAA) Amicus Curiae Committee, dated October 28, 2011, and served only on Secretary and Deputy Commissioner Dietrich and the President of CAAA, CAAA requested that we modify our decision to make it prospective only.[4]

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[2] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

[3] http://www.dir.ca.gov/dwc/dwc_newslines/2011/Newsline_46-11.html

[4] The body of the letter states in its entirety:

> "The California Applicants" Attorneys Association, CAAA, is an association of attorneys dedicated to representing industrially injured workers regarding matters that effect injured workers rights and benefits before the WCAB, the appellate courts and the legislature.
>
> We address this letter on behalf of thousands of injured workers whose rights and benefits will be effected by the DWC"s interpretation of the *Messele* decision (No 46-11; enclosed).
>
> We express grave concern regarding the DWC"s overly broad and retroactive application of the *Messele*, en banc decision. The effect of the DWC"s ruling will severely impact those cases where the parties have relied on the panels previously issued. There will be untold consequences on pending settlements, trials and potential appeals. A retroactive application of the *Messele* decision will create unnecessary litigation, delays and chaos.
>
> Therefore, CAAA respectfully requests modification of the *Messele* decision, applying the procedural rule prospectively. see Pebworth v. WCAB (2004) 116 CA4th 913, 69 CCC 199, 202-203."

In *Farris v. Industrial Wire Products* (2000) 65 Cal.Comp.Cases 824, 832 (Appeals Board en banc), we stated, "In workers' compensation cases, it is not uncommon to provide that newly stated judicial rules **or newly stated judicial interpretations of statutes** shall be applied prospectively only." (Emphasis added.) To avoid "a landslide of reopenings" (*ibid*.; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd*. (*Arvizu*) (1982) 31 Cal.3d 715, 728 [47 Cal.Comp.Cases 500, 509) or other objections to panels, to which the parties had previously acquiesced, and to reports that have already issued and may have formed the basis for settlements, we issue this notice of intention to modify our September 26, 2011 decision to state that it shall apply prospectively, i.e., it shall govern all panel requests made after September 26, 2011.

Specifically, we propose that if, prior to our September 26, 2011 decision, a panel was prematurely but otherwise properly requested and there was no objection on the ground of prematurity, then the resulting panel may not later be challenged on that ground. In other words, if an objection based on prematurity was not made prior to our September 26, 2011 decision, neither party may challenge the request, the ensuing panel, the remaining QME following the striking of names, or the resulting report for prematurity. Of course, other grounds for challenge may exist and would not be affected by our proposed modification. Moreover, our September 26, 2011 decision would not constitute good cause to reopen any order, decision, or award.

Anyone wishing to respond to our proposed modification with substantive comments will have ten (10) days from service of this notice of intention within which to file written comments. The 10-day comment period shall be extended by five calendar days from the date of service of this decision. (Cal. Code Regs., tit. 8, § 10507(a)(1).) The opportunity to respond is open to any interested individual or organization and is not limited to the parties in this case.

Pending further action by the Appeals Board, our September 26, 2011 decision remains in full force and effect.

In addition, we will now correct a clerical error, which appears at page 3, line 17 of our original opinion and in the second sentence of the second paragraph at 76 Cal.Comp.Cases at p. 959. The sentence is corrected to read, "He explained in his Opinion on Decision that if CCP section 1013(a)

applies to extend by five calendar days the 10 days within which to agree on an AME, the first day on which either party could request a panel was May 6, 2010." The year was originally indicated incorrectly as "2011."

For the foregoing reasons,

IT IS ORDERED that reconsideration of the September 26, 2011 Opinion and Decision After Reconsideration, Order Granting Removal, and Decision After Removal (En Banc) is **GRANTED ON APPEALS BOARD MOTION**.

IT IS FURTHER ORDERED that the clerical error in the date at page 3, line 17 of our September 26, 2011 Opinion and Decision After Reconsideration, Order Granting Removal, and Decision After Removal (En Banc) be corrected to "May 6, 2010," and that the parties make the correction by interlineations.

NOTICE IS HEREBY GIVEN that, absent written comments persuading us to do otherwise, filed and served within ten (10) days of the date of service recited below (plus an additional five (5) days for mailing), the Workers' Compensation Appeals Board will modify its September 26, 2011 Opinion and Decision After Reconsideration, Order Granting Removal, and Decision After Removal (En Banc) to provide that the principles set forth in the decision shall apply to other cases prospectively from September 26, 2011.

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IT IS FURTHER ORDERED that any such written comments *shall be filed in writing only* with the Workers' Compensation Appeals Board, Office of the Commissioners, 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, California 94142-9459). Comments shall *not* be filed with any district office of the WCAB or electronically in the Electronic Adjudication Management System. To be timely, any written comments must be *received* at the Office of the Commissioners within the time period prescribed above, and not merely posted within that period. (See Cal. Code Regs., tit. 8, §§ 10845(a), 10230.)

WORKERS' COMPENSATION APPEALS BOARD

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

11/4/2011

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

JOHN HILL
TSEGAY MESSELE
MONIKA HIGHT

CB/bea