WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL A. WILLETTE, ***Applicant,*** **vs.** **AU ELECTRIC CORPORATION; and STATE COMPENSATION INSURANCE FUND,** ***Defendant(s).***	**Case No. SJO 0245781** **OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION (EN BANC)**

Applicant, Michael A. Willette ("applicant"), seeks reconsideration of the Opinion and Decision After Reconsideration (En Banc) issued by the Appeals Board on October 5, 2004. In that decision, the Appeals Board rescinded the May 17, 2004 Findings and Award issued by the workers' compensation administrative law judge ("WCJ"), which had found in relevant part that: (1) applicant sustained industrial injury to his low back and tailbone on October 13, 2003, while employed as an alarm installer by Au Electric Corporation, the insured of State Compensation Insurance Fund ("defendant"); and (2) applicant will need further medical treatment to cure or relieve the effects of his injury, including the treatment jointly prescribed by his primary treating physician, Michael D. Butcher, M.D., and his secondary pain management physician, Hessam Noralahi, M.D., consisting of a TENS unit, water therapy, and acupuncture. In addition, the Appeals Board's October 5, 2004 decision set forth the procedure to be followed if a defendant's utilization review physician does not approve an unrepresented employee's treating physician's treatment authorization request in full: (1) if the unrepresented employee disputes the utilization review physician's determination, the unrepresented employee must timely object, and then a panel qualified medical examiner ("QME") must be obtained to resolve the disputed treatment issue(s); (2) once the panel QME's evaluation has been obtained, neither the treating physician

nor the utilization review physician may issue any further reports addressing the post-utilization review treatment dispute; (3) the panel QME should ordinarily be provided with and consider both the reports of the treating physician and the utilization review physician regarding the disputed issues; (4) if a post-utilization review medical treatment dispute goes to trial after the panel QME issues his or her report, both the treating physician's reports and the utilization review physician's reports are admissible in evidence; and (5) when a WCJ or the Appeals Board issues a decision on a post-utilization review medical treatment dispute, the reports of the panel QME, the treating physician, and the utilization review physician will all be considered, but none of them is necessarily determinative. Finally, the Appeals Board's October 5, 2004 decision remanded the matter to the trial level to give the parties an opportunity to follow this procedure for resolving the post-utilization review dispute over applicant's entitlement to medical treatment.

In his petition for reconsideration, applicant contends, in substance: (1) he should receive the treatment prescribed by his treating physicians because they have been caring for him for awhile and they are helping him to get back to work; (2) if defendant does not agree with what his treating physicians have prescribed, then going to a neutral physician (i.e., a QME) is fair, provided that the QME talks with him, examines him, and reviews all of his medical records; (3) the opinion of a utilization review physician who has never talked with him or examined him, and who just has looked some things up the book, should not be considered at all and should not have equal weight with the opinions of his treating physicians and of the QME who has talked with him, examined him, and reviewed all of his medical records; and (4) if the QME agrees with the treatment his physicians have prescribed, he should be able to get that treatment right away and not have to go to another hearing, which will further delay his treatment.

Defendant has filed an answer to the petition for reconsideration.

For the reasons that follow, we will dismiss applicant's petition for reconsideration.

A petition for reconsideration is properly made only from a "final" order, decision, or award. (Lab. Code, §§5900(a), 5902, 5903.) A "final" order has been 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, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665].) In general, where, as here, the WCAB grants reconsideration, rescinds the WCJ's decision, and returns the matter to the trial level for further proceedings and a new decision, the WCAB has not issued a "final" order subject to a petition for reconsideration. (See, *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Taylor*) (1983) 147 Cal.App.3d 1033, 1036, fn. 3 [48 Cal.Comp.Cases 774, 775, fn. 3]; see also, e.g., *Transportation Insurance Co. v. Workers' Comp. Appeals Bd*. (*Van De Hey*) (2003) 68 Cal.Comp.Cases 309; *Anbender v. Workers' Comp. Appeals Bd*. (1999) 64 Cal.Comp.Cases 546; *Employers First Ins. Co. v. Workers' Comp. Appeals Bd. (Morales)* (1997) 62 Cal.Comp.Cases 1710; *Goodrich v. Workers' Comp. Appeals Bd*. (1994) 59 Cal.Comp.Cases 763; *Minton v. Workers' Comp. Appeals Bd.* (1975) 40 Cal.Comp.Cases 313.) Accordingly, we will dismiss applicant's petition for reconsideration.

Although we are dismissing the petition, however, we will make the following brief observations.

First, after applicant sees the panel QME, and if both parties agree with the QME's opinion, there will be no need for further proceedings. If, however, either applicant or defendant does not agree with the panel QME's opinion, then the parties have the right to a judicial determination of the issue of applicant's entitlement to the medical treatment prescribed by Drs. Butcher and Noralahi.

Second, our October 5, 2004 decision did *not* state that defendant's utilization review reports would have the same weight as the reports of the treating physicians and the panel QME. We said:

> "[I]n determining whether to rely on the panel QME, the treating physician, or the utilization review physician, the WCJ or the Appeals Board will consider the weight to be given to the respective opinions and will consider whether they constitute substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd*.

> (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; see also, Cal. Code Regs., tit. 8, §10606 [compliance with Rule 10606 goes to weight to be given report]; *Insurance Co. of North America v. Workers' Comp. Appeals Bd*. (*Kemp*) (1981) 122 Cal.App.3d 905, 917 [46 Cal.Comp.Cases 913] [a report that is 'woefully inadequate' in its compliance with Rule 10606 should not be relied upon].)"

We have made no determination about the weight to be given to any of the medical evidence in this case.

For the foregoing reasons,

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IT IS ORDERED that the petition for reconsideration filed by applicant on October 22, 2004, be, and it is hereby, **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERLE C. RABINE, Chairman

WILLIAM K. O'BRIEN, Commissioner

JAMES C. CUNEO, Commissioner

JANICE J. MURRAY, Commissioner

FRANK M. BRASS, Commissioner

RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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