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

KEVIN CROWL,

Applicant,

v.

COLLINS ELECTRICAL COMPANY; ZURICH AMERICAN INSURANCE,

Defendants.

Case No. ADJ16721998 (MF); ADJ16321643; ADJ16321647

JOINT FINDINGS AND ORDER

The above-entitled matter having been heard and regularly submitted, the Honorable James P. Finete, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT:

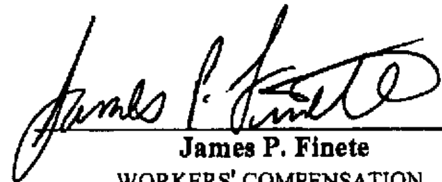
ADJ16721998 (MF); ADJ16321643; ADJ16321647

1. Applicant's claimed injuries on 10/18/2021 (ADJ16321643), 10/21/2021 (ADJ16321647) and 11/18/2021 (ADJ16721998), are governed by a valid and binding collectively-bargained Alternative Dispute Resolution (ADR) "carve-out" agreement between Applicant and Collins Electrical Company pursuant to Labor Code Sections 3201.5.

ORDER

IT IS HEREBY ORDERED that Applicant's claims herein are dismissed pursuant to Labor Code Section 3201.5.

DATE: April 6, 2023



James P. Finete
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the Official Address record.
By:
On: 4/6/2023

BRADFORD AND BARTHEL
APR 10 2023
SACRAMENTO

CASE NUMBERS: ADJ16721998 (MF); ADJ16321643; ADJ16321647
KEVIN CROWL -vs.- COLLINS ELECTRICAL COMPANY; ZURICH AMERICAN INSURANCE

WORKERS' COMPENSATION JUDGE: JAMES P. FINETE

OPINION ON DECISION

In the present matter, Defendant filed a "Petition For Dismissal"[1] as well as an "Amended Petition For Dismissal"[2] concerning three Application for Adjudication of Claims filed with the Workers' Compensation Appeals Board - ADJ16721998 (MF); ADJ16321643; ADJ16321647 (collectively, the "Applications").

Defendant contends that the three Applications are subject to dismissal because Applicant and the employer are governed by a valid and binding collectively-bargained Alternative Dispute Resolution (ADR) "carve-out" agreement pursuant to Labor Code Sections 3201.5. and 3201.7.

Applicant has filed an "Objection to Petition For Dismissal"[3] ("Objection") and a Trial Brief.[4]

Applicant does not contest the existence of the carve-out agreement or otherwise contest that it applies to the Applications in this matter. Instead, Applicant's attorney asserts that the ADR program is invalid because the actions of an ombudsman within said program have violated Applicant's due process rights by not permitting representation by an attorney at the mediation phase of the ADR process and by "closing" Applicant's case without a final adjudication; and because Labor Code Sections 5301 and 3201.5 confer jurisdiction on the WCAB.

For the reasons enumerated below, this Court rules in favor of Defendant, and finds that dismissal of the Applications is compelled pursuant to Labor Code Section 3201.5.

As reflected in *Johnson v. WCAB (Zeller Electric),* (2003) 68 Cal. Comp. Cases 1500, citing *Kaiser v. California Casualty Indemnity Exchange (1998)* [63 Cal. Comp. Cases 1391], the Workers' Compensation Appeals Board has previously set forth a procedure to be followed where a motion to dismiss pursuant to *Labor Code § 3201.5* is made. The WCALJ is to determine: (1) Whether there is a collective bargaining agreement as described in *Labor Code § 3201.5* to which both parties are subject at the time of the alleged injury; and (2) Whether the Administrative Director had issued an appropriate letter of eligibility in connection with the collective bargaining agreement."

If those two requirements are met then dismissal of the application for lack of WCAB jurisdiction is mandated.

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[1] EAMS DOC ID: 43285783 (all references to EAMS filings are to the Master File ADJ16721998 unless otherwise stated)

[2] Defendant's Trial Exhibit A - EAMS DOC ID: 45621946

[3] Applicant's Trial Exhibit 6 - EAMS DOC ID: 43391290

[4] EAMS DOC ID: 45488034

Issue #1 – Validity of Union Contract

The employer is claiming they have a valid union, and that the parties are bound by the NECA / IBEW Memorandum Of Understanding[5] between the International Brotherhood of Electrical Workers (IBEW) and the employer, Collins Electrical Company Inc, dated October 1, 1994, as well as the Alternative Disputes Resolution Agreement ("Agreement") between the 9th district of the IBEW and District 9 of the National Electrical Contractors Association ratified on December 3, 1995.[6]

The Court looks to Chapter 4.5, Division of Workers' Compensation Subchapter 1.8, Administrative Director – Administrative Rules Collective Bargaining Agreements, Under Labor Code Section 3201.5 and 3201.7:

Section 10200, subchapter (a) defines an employee as one who is covered under either (1) A provision of a collective bargaining agreement recognized by the Administrative Director pursuant to Labor Code section 3201.5; or (2) A labor-management agreement recognized by the Administrative Director pursuant to Labor Code section 3201.7.

Section 10201 outlines the procedure for determining eligibility under Labor Code Section 3201.5; subchapter (a) states that every employer and union proposing to establish any program permitted by Labor Code section 3201.5 shall jointly request the Administrative Director to determine eligibility. Subchapter (c) indicates the Administrative Director shall issues either a letter of eligibility or a denial of eligibility.

On July 11, 2019, the Administrative Director issued a letter ("Letter") that recognized the Agreement as meeting the eligibility requirements of Labor Code Section 3201.5.[7] Although the Letter references an expiration date of August 14, 2022, on December 22, 2021, James R. Robyn, ombudsman ("Ombudsman") of the NECA/IBEW Workers' Compensation Trust ADR Program", issued a letter to Applicant documenting that his injuries were governed by the ADR carve-out.[8] Since then the Ombudsman has authored emails[9] and letters[10] in 2022 that evince the continuing application of the ADR program.

Further, on September 16, 2022, the Administrative Director authored a letter labeled a "Labor Code Section 3201.5 Confirming Renewal Eligibility for Designated Members in the NECA/IBEW ADR Agreement" advising that the employer, Collins Electrical Company Inc., demonstrated eligibility under the carve-out program.[11]

Based upon defendant's Exhibits E, F, and G, and Court Exhibits XX, YY, ZZ, the union and Agreement are legitimatized by the Office of the Administrative Director and the Ombudsman for the ADR Program; that the ADR program remains in full force; and, therefore, this Court lacks jurisdiction to make a different determination.

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[5] Defendant's Trial Exhibit G - EAMS DOC ID: 45621952
[6] Defendant's Trial Exhibit F - EAMS DOC ID: 45621951
[7] Defendant's Trial Exhibit E - EAMS DOC ID: 45621950
[8] Defendant's Trial Exhibit D - EAMS DOC ID: 45621949
[9] Court's Trial Exhibit XX - EAMS DOC ID: 45621954
[10] Court's Trial Exhibit YY - EAMS DOC ID: 45621953
[11] EAMS DOC ID: 45695198. Following the trial and submission for decision, this Court issued a notice of intent to vacate the submission on the basis that the record did not include evidence that the employer and the carve-out remained in full force. This documented was submitted as part of Defendant's "Objection to Notice of Intent to Vacate Submission and to Set Matter for Hearing", dated March 29, 2023, and the letter from the Administrative Director is now entered into evidence as the Court's Exhibit ZZ.

Issue #2 – Administrative Director's Power and Jurisdiction

If Applicant's counsel wishes to dispute the legitimacy of the carve-out agreement, they must address the issue with the Office of the Administrative Director. However, Applicant insists that the WCAB is the proper venue. Applicant is incorrect.

As stated in *Jimenez v. Samuel Hale*, (2020) 85 Cal. Comp. Cases 717, the legislature conferred jurisdiction in the Administrative Director (AD) — not the WCAB — to recognize labor-management agreements and the AD has the "power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred" by the Legislature under the Labor Code (Lab. Code, § 133).

Although the WCAB has a broad grant of authority to exercise all judicial powers vested in it by the Labor Code and may do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it by the Labor Code (§§ 111, 133; see §§ 115, 130, 134, 5307, 5309, 5813, 5900 et seq.) [describing various powers of the Appeals Board]), *the WCAB has no authority in those matters where jurisdiction is vested in the AD by the Labor Code*. (See *Stevens v. WCAB*, (2015) 241 Cal. App. 4th 1074, 1091 [194 Cal. Rptr. 3d 469, 80 Cal. Comp. Cases 1262 [statutory exceptions to the WCAB's exclusive adjudicatory jurisdiction in sections 4610 (utilization review) and 4610.6 (independent medical review)]; see also Lab. Code, §§ 3715(c) (workers' compensation insurance), 4603.6(f) (medical bills), and 139.21 (suspension of medical providers) [statutory exceptions to the WCAB's exclusive adjudicatory jurisdiction].)

When, such as here, there is evidence of a labor-management agreement (the ADR Agreement) recognized by the AD, the WCAB lacks jurisdiction to review the AD's recognition of that agreement.

Rule 10202(g) allows "any person" to submit documents to the AD "that bear on the application of the union and employer ..." (Cal. Code Regs., tit. 8, § 10202(g).) It may be that Applicant has remedies for his objections to the ADR Agreement and/or his employers' actions in state or federal civil jurisdictions or with the National Labor Relations Board. However, this Court (and the WCAB) lack jurisdiction over those issues. *Jimenez v. Samuel Hale*, (2020) 85 Cal. Comp. Cases 717). At any rate, Applicant has provided no evidence that he has sought redress or otherwise has challenged the validity of the carve-out agreement before the AD.

Issue #3 – Due Process

Applicant complains that despite the existence of the ADR program, this Court should nevertheless disregard the exclusive jurisdiction of the ADR program. Applicant asserts that the ADR Ombudsman has essentially abrogated his duties by not progressing Applicant's claim via assignment of a medical-legal evaluator, mediation and/or arbitration; and by not permitting Applicant to have legal counsel at the mediation stage of the ADR process.

Even assuming that Applicant's allegations concerning the Ombudsman are correct, this Court's participation in the matter must cease once this Court finds, as it does, that the ADR program is "valid and binding".

Applicant's argument that this Court has jurisdiction because the ombudsman in the ADR process has purportedly failed to take appropriate action is an argument that has been made several times before, and failed. For example, in *Yamnitskiy v. Morrow Meadows Corp*, 2011 Cal. Wrk. Comp. P.D. Lexis 407, it was held that the employee, an electrician, was subject to the ADR process pursuant to Labor Code Section 3201.5 when the defendant submitted evidence that it had a valid ADR in place, so that the WCAB had no jurisdiction to determine alleged violations by defendant and/or the ombudsman with the ADR process, as the employee was first required to utilize the mediation / arbitration process with the ADR system, and then only after a decision under the ADR process may the injured employee invoke WCAB jurisdiction.[12]

Applicant complains that his due process rights are being violated because he is unable to fully litigate his case in the ADR process. Nevertheless, the Appeals Board has limited jurisdiction over disputes arising from a claim subject to an ADR agreement, and the parties must exhaust their remedies in the ADR program before seeking intervention from the Appeals Board. See *Costa v. WCAB*, (1997) 62 Cal. Comp. Cases 1149 (writ den.); see also *Costa v. WCAB*, (1998) 65 Cal.App.4th 1177, 77 Cal. Rptr. 2d 289 [the Court of Appeal affirmed the Appeals Board's order denying reconsideration of the order dismissing applicant's claim for lack of jurisdiction since it was subject to an ADR agreement].)

Applicant also argues that the Agreement violates his due process rights because it does not permit legal counsel during mediation with the Ombudsman. Section 4.4 of the Agreement details the mediation procedures, and Section 4.8 states in part, "Neither party will be permitted to be represented by legal counsel at mediation ... All communications between the mediator and the parties shall be directly with the parties, and not through legal counsel."

However, such procedures established under a carve-out agreement pursuant to Labor Code § 3201.5 need not be the same as those applicable to ordinary workers' compensation disputes. Labor Code § 3201.5 allows carve-outs to create different procedural rights, duties, and obligations than exist for ordinary workers' compensation claims. See *Miller v. Cupertino Electric*, 2012 Cal. Wrk. Comp. P.D. 90. As noted above, this is an issue for the AD; not this Court.

Too, Section 4.9 of the Agreement specifies that following the mediation process any party may request arbitration. *At this stage, Applicant may have legal counsel represent him at the arbitration.* Sections 4.10 through 4.12 detail the arbitration process. Section 4.14 of the Agreement provides for the assignment of a medical professional solely at the employer's expense to assist in any medical dispute. Additionally, Section 3.9 provides that either party may request a second medical opinion.

The law is clear that any redress from an action by the ADR program must be sought to the Workers' Compensation Appeals Board via a Petition for Reconsideration. The Applicant is not permitted to litigate the case at the District Office level via trial just because he disapproves of the actions or results in his ADR case.

Further, even assuming the Applicant has filed a timely Petition for Reconsideration, the WCAB's powers to intervene are limited. See *De La Rosa v. All Area Plumbing*, 2018 Cal. Wrk. Comp. P.D. Lexis 526, wherein the WCAB held that when an employee is subject to the

[12] In *Yamnitskiy*, similar to the present matter, the trial judge ordered defendant to file an eligibility letter from the AD.

ADR process established between his employer and his union pursuant to Labor Code Section 3201.5, the Appeals Board is precluded from taking action where the employee does not timely request a QME to challenge the denial of his claim, and does not timely seek mediation to address the issues through the ADR process.[13]

Labor Code Section 3201.7(a)(3)(A) requires that an ADR program provide for review by the Appeals Board of a final order, decision, or award issued by an arbitrator. The ADR Agreement in the instant matter complies with this requirement. Section 4.14 of the Agreement states that the Arbitration is subject to Labor Code Section 3201.5 and is subject to review by the WCAB. Since Applicant has not proceeded to Arbitration in the ADR program, intervention by the WCAB is premature.

In the instant matter, the Agreement between Applicant's union and employer includes a Section 4.2, which specifically provides as follows:

> "This program shall be used in place of the filing of an application with the WCAB. Any claim subject to this agreement filed with the WCAB for resolution will immediately be removed and placed within the program established by this Agreement. This is the sole means of dispute resolution and no dispute shall proceed to the California Workers' Compensation Appeals Board until it has completed the mediation and arbitration process defined by this agreement."

Applicant as a union member is bound by this Agreement.

The Appeals Board consequently has jurisdiction to address a final order, decision or award from an arbitrator in an ADR program, but no jurisdiction to address a non-final order by an arbitrator in these programs. (See *Bradford v. McMillian Bros. Electric Inc.*, 2008 Cal. Wrk. Comp. P.D. LEXIS 756] [no statutory authority for the Appeals Board to remove a carve-out case to itself and the carve-out statute expressly replaces the Appeals Board's power to remove a case to itself].)

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[13] In this instance, Applicant's primary argument is that the Ombudsman is refusing to permit Applicant to be seen by a qualified medical evaluator. But the Ombudsman has explained to Applicant the following:[13]

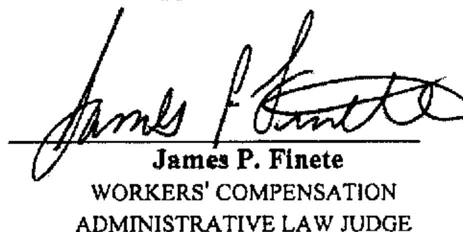
> Good Afternoon Mr. Crowl,
>
> I have called several times but the phone goes straight to voicemail.
>
> I show there are three claims filed with the following dates of injury, 10/18/2021, 10/21/2021, and 11/18/2021.
>
> Please let me know which claim you are referring to. The 10/18/2021 claim (001960-185328-WC-01) was denied by the insurer on 11/15/2021. Our office sent you information on 11/16/2021 on how to object to the denial and request the QME process. You had thirty days from 11/16/2021 to request the QME process. Since you did not request the QME process you agreed with the denial and the right to dispute such terminated per the rules of the ADR Program. The 10/21/2021 claim (001960-185418-WC-001) was also denied by the insurer on 11/15/2021 and our office sent you information on how to object to the denial and request the QME process. You did not respond and request the QME process for that denial either. The 11/18/2021 claim (001960-187451-WC-01) was denied by the insurer on 12/22/2021. Our office sent you information on 12/22/2021 on how to object to the denial and request the QME process. You did not respond and request the QME process for that denial either. All three claims have been closed. If there are some circumstances I am not aware of, please let me know.
>
> James R. Robyn, WCCP Ombudsman NECA/IBEW Workers' Compensation Trust ADR Program

A party in a carve-out case may seek reconsideration from the Appeals Board of a "final order, decision, or award." (Lab. Code, § 3201.5(a)(1), emphasis added).) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case"[14] or determines a "threshold" issue that is fundamental to the claim for benefits.[15] Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. *Maranian v. WCAB*, Id. at p. 1075 ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "); *Rymer v. Hagler*, supra, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals (Kramer)*, supra, 82 Cal.App.3d at p. 45 ("[t]he term ['final'] does not include intermediate procedural orders").) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, *venue*, or similar issues. *Ramirez v. Vons*, 2022 Cal. Wrk. Comp. P.D. Lexis 316

As it stands, there is no final order from an arbitrator in which to invoke WCAB jurisdiction. As further expressed in the recent decisions of *Ramirez v. Vons*, 2022 Cal. Wrk. Comp. P.D. Lexis 316, and *Hayes v. Anderson & Howard Electric*, 2018 Cal. Wrk. Comp. P.D. Lexis 150, pursuant to Labor Code Section 3201.5(a)(1), parties in carve-out cases may only seek WCAB review from a final order, decision or award by an arbitrator and may not seek WCAB review of interlocutory or interim orders.

Simply stated, if there is a final order from the ADR process then Applicant was required to file a Petition for Reconsideration directly with the WCAB as he would if the decision was issued by a workers' compensation judge; but if there is not a final order from the ADR process the WCAB has no jurisdiction to address the issue. In either event, Applicant has no right to seek redress before a WCJ at the district office level.

Therefore, in view of the forgoing discussion, dismissal of the Applications is mandated by Labor Code Section 3201.5



DATE: April 6, 2023

James P. Finete
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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[14] *See Rymer v. Hagler, (1989) 211 Cal.App.3d 1171, 1180, 260 Cal. Rptr. 76; Safeway Stores, Inc. v. WCAB (Pointer), (1980) 104 Cal.App.3d 528, 534-535 [163 Cal. Rptr. 750, 45 Cal. Comp. Cases 410]; Kaiser Foundation Hospitals v. WCAB (Kramer), (1978) 82 Cal.App.3d 39, 45 [43 Cal. Comp. Cases 661])*

[15] See *Maranian v. WCAB*, (2000) 81 Cal.App.4th 1068, 1070, 1075 [97 Cal. Rptr. 2d 418, 65 Cal. Comp. Cases 650]

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

04-06-2023

OFFICIAL ADDRESS RECORD/PROOF OF SERVICE

Case Number: ADJ16721998/ADJ16321643/ADJ16321647

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JOINT FINDINGS AND ORDER/OPINION ON DECISION SERVED BY MAIL ON ALL PARTIES LISTED ABOVE ON: 4/6/2023 BY: [signature]