

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ANTONIO HUERTA, *Applicant*

vs.

**STATE OF CALIFORNIA; IN HOME SUPPORT SERVICES; Legally Uninsured;
administered by YORK RISK SERVICES, *Defendants***

**Adjudication Numbers: ADJ10661601; ADJ10663914
Pomona District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues in these cases. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of a March 12, 2021 Joint Findings, Award, and Order (FA&O) wherein a workers' compensation administrative law judge (WCJ) found that applicant sustained injury arising out of and/or in the course of employment (AOE/COE) to the cervical spine, lumbar spine, bilateral knees, and bilateral shoulders. The WCJ also found the July 24, 2020 report of treater, Dr. Khalid Ahmed, to be inadmissible. Applicant alleges that the report should have been admitted under Labor Code section² 5502(d)(3) as it was unavailable at the time of the July 6, 2020 mandatory settlement conference (MSC).

We have received an Answer from the defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration (Petition), the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the FA&O.

¹ Commissioner Lowe, who previously served on the panel which granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Appeals Board. Following the grant of reconsideration, Commissioner Dodd became unavailable to participate. Other panelists have been substituted in their place.

² Unless otherwise stated, all further statutory references are to the Labor Code.

FACTS

Applicant while employed by defendant as a caregiver claims to have sustained injury during the period from 2012 through February 2015 to the cervical spine, lumbar spine, bilateral shoulders, bilateral elbows, bilateral knees, and bilateral feet. On July 6, 2020, the matter proceeded to a MSC and a pretrial conference statement (PTCS) was submitted on August 7, 2020, along with an exhibit list. On August 18, 2020, an updated exhibit list was filed, which listed the July 24, 2020 report of Dr. Ahmed. On January 4, 2021, the matter ultimately proceeded to trial. At trial, defendant objected to admission of the July 24, 2020 report and argued that pursuant to section 5502(d)(3), discovery closed after the July 6, 2020 MSC.

In the March 12, 2020 Opinion on Decision (OOD), the WCJ stated that the July 24, 2020 report of Dr. Ahmed would be excluded from the record because there was “no mention of Dr. Ahmed’s July 24, 2020 evaluation appointment on the August 7, 2020 pre-trial conference statement” and no objection to the trial moving forward “on the basis that additional discovery was needed.” The WCJ emphasized that applicant made no request “to keep discovery open.”

DISCUSSION

We find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration is taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order is defined as one that determines “any substantive right or liability of those involved in the case” or a “threshold” issue fundamental to a claim for benefits. (*Rymer v. Hagler 2* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd.* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]; *Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd.* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian, supra*, at 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’”]; *Rymer, supra*, at p. 1180

["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, 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, and other similar issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the March 12, 2021 FA&O addresses both threshold and interlocutory issues. However, applicant's Petition only challenges the WCJ's decision regarding admission of the July 24, 2020 report. As such, we will consider applicant's Petition under the removal standard.

Removal is an extraordinary remedy rarely exercised by the appeals board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The appeals board will grant removal only if the petitioner can show that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a).) The petitioner must also demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Id.*) In the instant case, we believe substantial prejudice or irreparable harm will result if removal is denied and reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to applicant.

Turning to the issue of when discovery closes, section 5502(d)(3) provides: "Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." Here, it is indisputable that the July 24, 2020 report of Dr. Ahmed was not available at the time of the July 6, 2020 MSC as applicant had not yet attended the July 24, 2020 appointment with Dr. Ahmed. As such, the report should be admitted on this basis. Further, both statutory law and case law favor the admissibility of medical reports, provided the reports are obtained in accordance with the Labor Code. (See Lab. Code, §§ 4064(d), 5703(a), 5708; e.g.,

Valdez v. Workers' Comp. Appeals Bd. (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209].) There is nothing in the record to suggest that the July 24, 2020 report was not obtained in accordance with the Labor Code.

Additionally, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [97 Cal Rptr. 2d 852, 65 Cal.Comp.Cases 805].) A fair hearing is "... one of 'the rudiments of fair play' assured to every litigant ..." (*Rucker, supra* at 158.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157- 158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

It is well known the Appeals Board also has the discretionary authority to develop the record when appropriate to provide due process or fully adjudicate the issues. (Lab. Code §§ 5701, 5906). As explained in *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924], "The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims." Full development of the evidentiary record also ensures that the decision is based upon substantial evidence. As explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), a decision "must be based on admitted evidence in the record" and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence "... a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Aside from providing assurance that due process is being provided, this "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of

seeking reconsideration more meaningful." (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

The above cases and statutes underscore the importance of allowing full consideration of the entire evidentiary record, in furtherance of the substantial justice required in workers' compensation proceedings. Accordingly, we believe that the July 24, 2020 report of Dr. Ahmed should be admitted into evidence. Thus, we rescind the March 12, 2021 FA&O and return the matter to the trial level.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the March 12, 2021 Joint Findings, Award, and Order is **RESCINDED** and the matter **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 21, 2024

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

**ANTONIO HUERTA
LERNER MOORE
LAW OFFICE OF MANN & MANN
INGBER & WEINBERG**

RL/cs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.

CS